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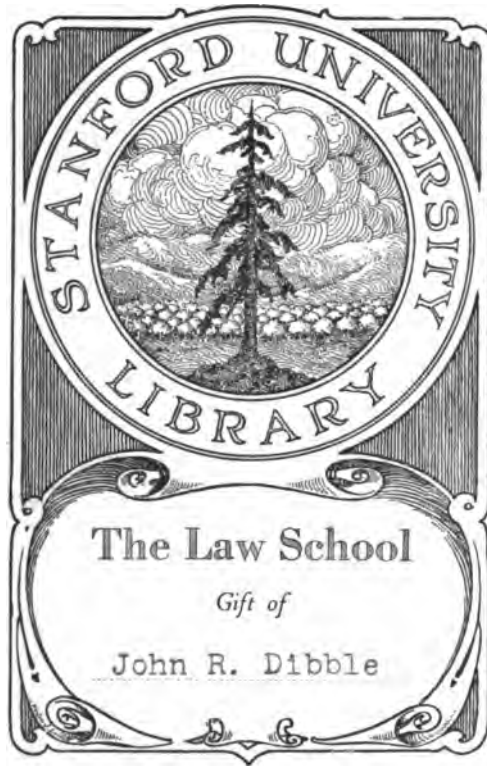
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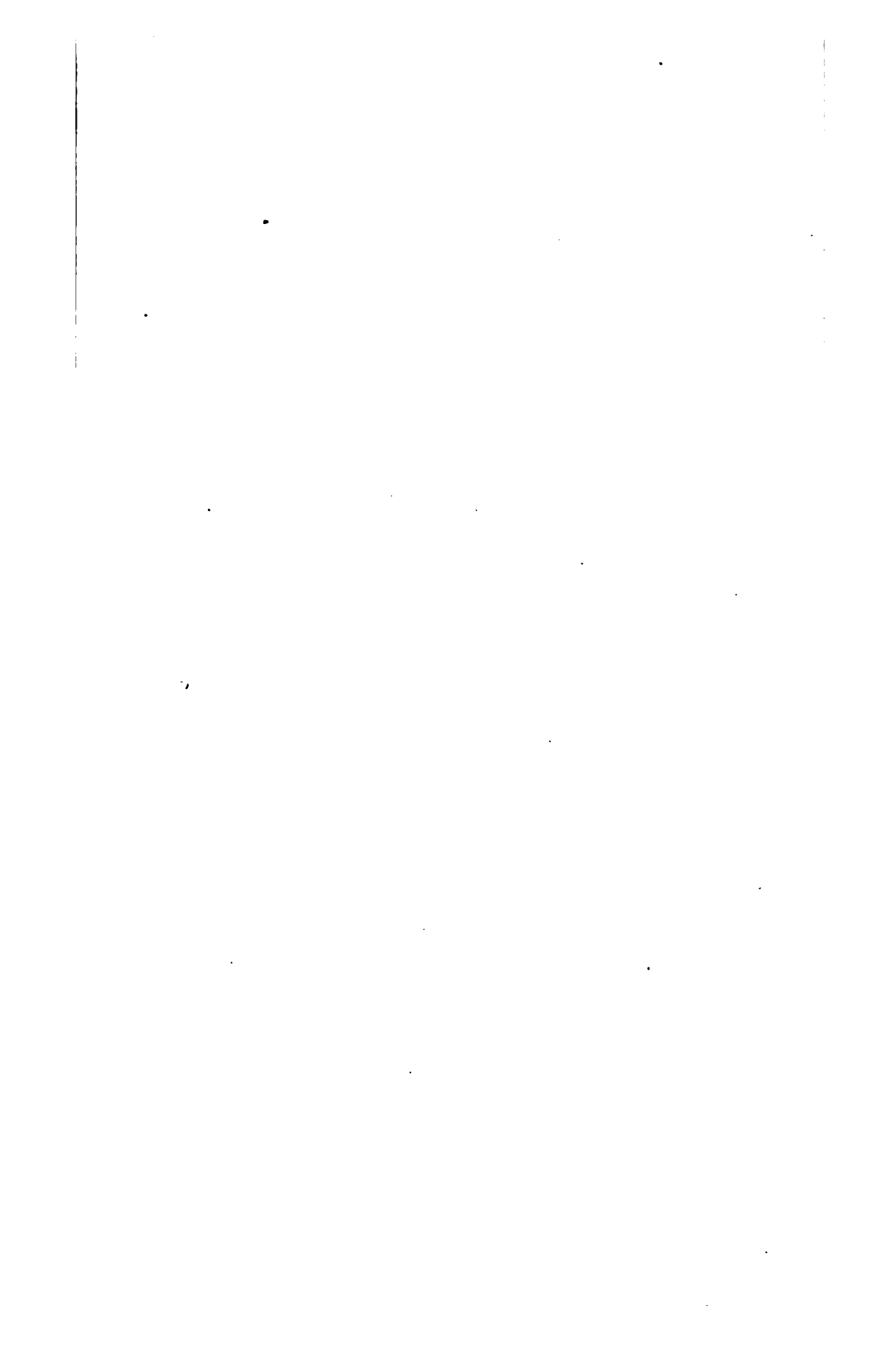
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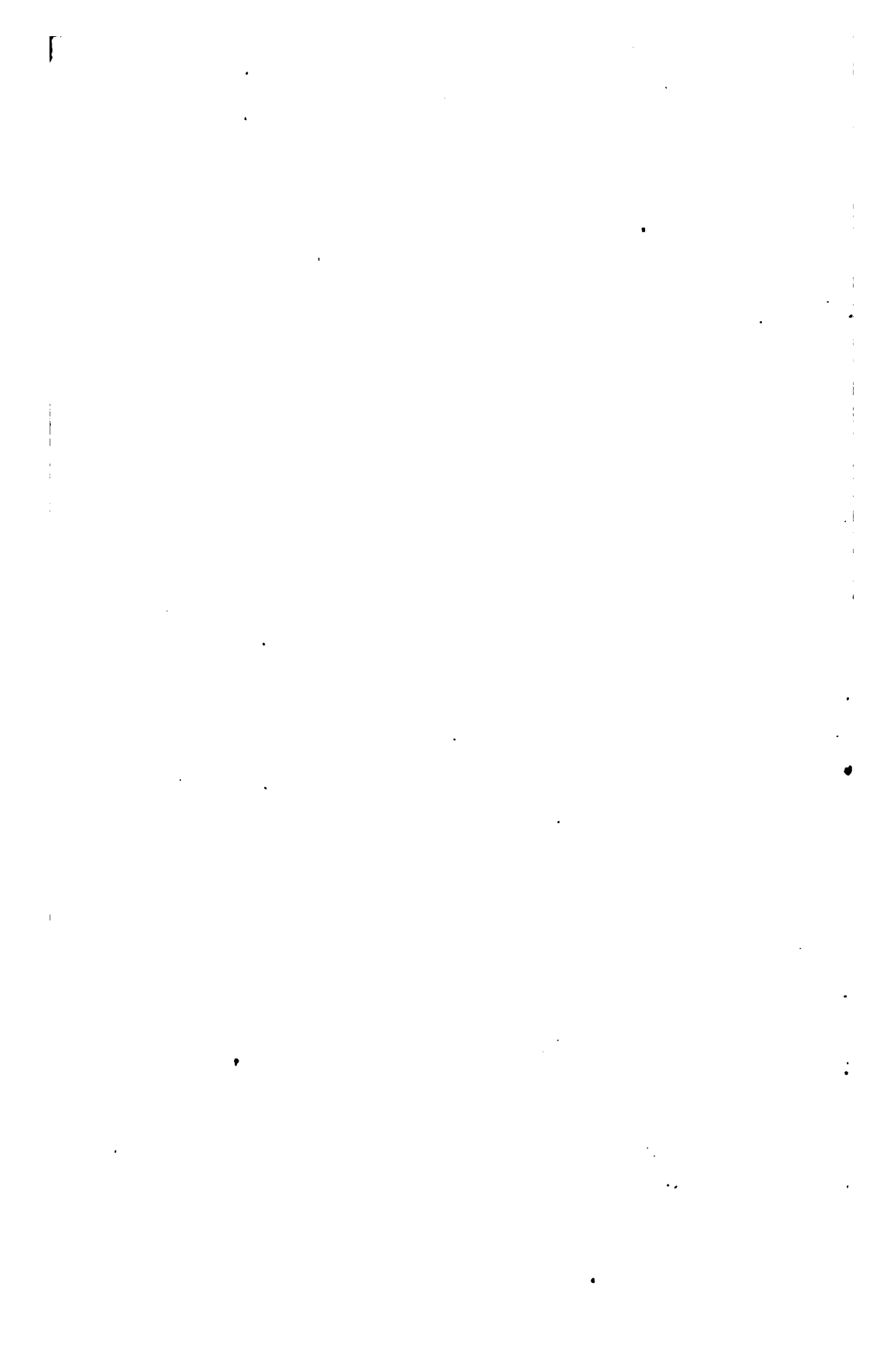
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THE PRINCIPLES
OF THE
AMERICAN
LAW OF CONTRACTS
AT LAW AND IN EQUITY.

BY

JOHN D. LAWSON, B. C. L., LL.D.,

PROFESSOR OF COMMON LAW IN THE UNIVERSITY OF THE STATE OF MISSOURI,
AND AUTHOR OF "RIGHTS, REMEDIES AND PRACTICE," "THE
LAW OF USAGES AND CUSTOMS," "LEADING CASES
SIMPLIFIED," ETC., ETC.

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WILLIAM C. BROWN

To the Hon. G. F. ROTHWELL, *President*, the Hon. B. M. DILLEY,
the Hon. GARDINER LATHROP, the Hon. R. B. OLIVER and Gen.
E. Y. MITCHELL, *Members of the Board of Curators of the
University of the State of Missouri:*

Gentlemen — Your official labors and responsibilities illustrate the fact that the study and practice of the law are not inconsistent with a deep interest in the promotion of higher education in all the branches of literary and scientific learning. It affords me much pleasure to dedicate this book to you, as members of my own profession. I desire, in doing so, not only to connect it as closely as possible with the institution in which the greater part of my work upon it was done, but to testify to your uniform kindness, courtesy and consideration to myself personally, and to your zeal in the advancement of the interests of that particular department of the University of which I am a member. For it is through the opportunities and the support which a position like mine presents and receives that books of this character are able to be written.

Your obedient servant,

THE AUTHOR.

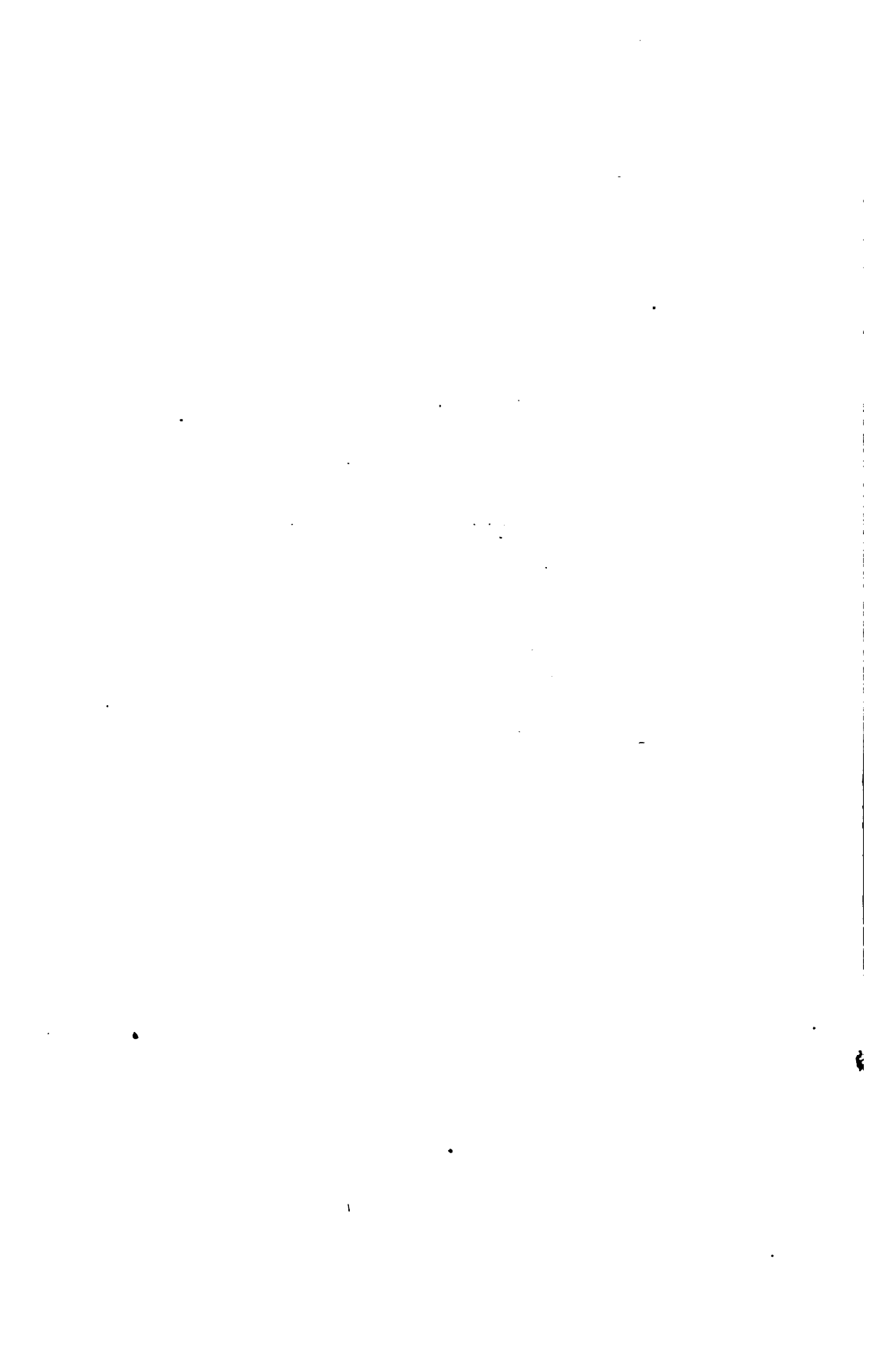


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THE
PRINCIPLES
OF THE
AMERICAN LAW OF CONTRACTS.

PRELIMINARY CHAPTER.

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§ 1. **Purpose of this Work.**—The necessity for a distinctively American work upon the Principles of Contract was brought to my notice during the preparation of a series of lectures on Contracts, in my capacity of Professor of Common Law in the Law Department of the University of the State of Missouri. It had been my aim to present to the students of that department, in a necessarily limited period of time, a practical view of the Law of Contracts as exemplified in the decisions of the American courts, and to accompany and supplement this view by the study of some text-book upon this branch of the law. But in the choice of a suitable text-book I encountered a difficulty I had neither

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foreseen nor believed possible. Two English treatises remarkable for their clearness of analysis and exact learning were, for reasons to be presently mentioned, quite unsuited to my purpose, and there was scarcely an American treatise which had not been written entirely from the standpoint of the practitioner and not at all from the point of view of the student at law. And I finally became convinced that there was no American text-book which presented *a clear and concise statement of the Principles of the Law of Contracts as contained in the decisions of our courts of last resort*. Therefore I set myself to the task of preparing a work which should in every way be suitable for the purpose I had in view as a teacher, and which should likewise recommend itself not only to the teachers of law in other institutions of learning in the United States but to the busy practitioner as well.

My lectures on Contracts, extended and amplified, form the basis of this treatise, and with a liberal citation of cases from the courts of every one of our States it will be found, I think, in no sense a local work. I have refrained, except when better authorities were wanting in the American adjudications, from the citation of English authorities, for the reason already mentioned, viz. : my desire that this shall be distinctively a work on the Principles of the American Law of Contracts.

§ 2. **The English Treatises on the Subject.**—The English works on the Law of Contracts which are more or less known to the American lawyer are those of Addison, Anson, Chitty, Leake, Pollock and Smith. The last is too elementary for the student, and of but little value to the practitioner, while the works of Addison, Chitty and Leake are not only open to the same objection as those of Hilliard, Parsons, Story and Wharton of our own country, but possess a radical defect, in that they treat of the law of England and not of the law of the United States. In the

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case of a book intended to be used by the American lawyer there must always be a certain advantage in its having been written to explain the American law from the point of view of the American adjudications. The works of Anson¹ and of Pollock,² the former edited with great care, ability and learning by a professor of one of the most distinguished law schools in our country, the latter annotated with a fullness and accuracy not equaled I think in the American edition of any other English text-book, are justly regarded as productions of the greatest merit. Professor Pollock's treatise, however, embraces but a part of the Law of Contracts, purposely omitting, as it does, the important topics of the Interpretation, Performance and Discharge of the Contract. Had Professor Anson's treatise been the work of an American jurist, and devoted to American instead of English law, the want to which I have referred would have been filled on the day it was published. Not only has it suggested to me what such a work should be, but in the arrangement of my topics, in the statements of the principles of the Common Law and in the illustrations of those principles, I have in very many places in this volume to acknowledge my indebtedness to its eminent author.

Nevertheless, the day has gone by when an English law book, no matter how well edited or annotated here, will satisfy the American lawyer. We have a jurisprudence of our own. Such rules of the common law as our courts have considered the product of an obsolete social system and inapplicable to our state of society, they have rejected without waiting for legislative action; others they

¹ Principles of the English Law of Contract and of Agency in its Relation to Contract. By Sir William R. Anson, Bart. D. C. L. Second American from fourth London edition. By Jerome C. Knowlton, A. B., Professor of Law in the University of Michigan. Chicago: Callaghan & Co. 1887.

² Principles of Contract at Law and in

Equity, being a treatise on the general principles concerning the validity of agreements with a special view to the Comparison of Law and Equity. By Frederick Pollock, Barrister at Law. Second American from the fourth English edition. By Gustavus H. Wald, of the Cincinnati bar. Cincinnati: Robert Clarke & Co. 1885.

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have adopted with qualifications; others again they have adopted without any change. This American jurisprudence and system of judge-made law is found not in the English reports and commentaries, but in the decisions of more than three score courts of final resort, contained in more than four thousand volumes of reports. The published judicial decisions of any one of our larger States now exceed, both in number and in the extent of questions passed upon, those of all the English common law courts a quarter of a century ago — the days when an American lawyer thought his library not half furnished if it lacked a full set of the English reports from Taunton to Best & Smith, and the citation of English precedents was still observed by the lawyer to support his argument and by the judge to sustain his judgment. About this time or a little earlier the caustic British critic was asking, “Who reads an American book?” The American law book seller of to-day may more fittingly inquire, “Who buys an English Law Report?” And this change has come about not because the judges of the English bench of to-day are not the equals of those of yore, but because in our own adjudications we are now sufficiently supplied with legal precedent and legal argument.

§ 3. **The American Treatises on the Subject.** — Bishop, Hilliard, Parsons, Story and Wharton are the best known of the American writers on the Law of Contracts. But Hilliard and Story’s works are now practically obsolete and they, as well as the works of Parsons and Wharton, are in no sense treatises on the Principles of Contracts, but rather digests, compendiums or abridgments. It has always been a wonder to me as it has been to others,¹ that one could ever learn the law from these great commentaries, so loaded with authorities, so hampered with dis-

¹ See Mr. Irving Browne’s preface to *Relations*. Boston: The Boston Book Co.
his Elements of the Law of Domestic

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tinctions, so diffuse in discussion.¹ Any criticism of mine of Dr. Bishop's recent treatise² must be made from the stand-point of the student. The more one studies the subject, and the deeper he is read in the decisions of the courts, the greater will be his admiration of the genius of the author in evolving his principles and reconciling conflicting cases and his courage in combatting erroneous doctrines. I know of no more delightful book for the lawyer than Dr. Bishop's, and few more difficult for the novice to comprehend. The latter is hardly to be blamed if he finds it impossible very often to grasp the meaning of an author who takes it for granted that his reader is to some extent learned in the law.

We have then many digests of or commentaries upon the Law of Contracts for the practitioner and we have a few manuals of the Law of Contracts for the student. But the commentaries are of slight use to the student and the manuals are of little value to the practitioner. I have essayed in the following pages to write a work from which the student may learn the law, and which will also serve him as a safe and ready adviser after he shall have entered the ranks of the profession.

§ 4. Text-Books on Special Topics and Law Reports.—I have endeavored in the body of this book to state the Principles of the American Law of Contracts accurately, concisely and clearly. The student or practitioner who desires a closer view of the special subjects embraced in this general topic, and the applications of these principles to particular cases, will find them either in

¹ Two books written specially for the student deserve notice. Metcalf on Contracts, which has had its day, and Prof. Benjamin's General Principles of the Law of Contract in the form of rules (Bloomington, Ill., 1891). The latter is an admirable little book, which will be found of great service in reviewing the

principles and the legal rules relating to Contracts, and I cheerfully recommend it to the student.

² Commentaries on the Law of Contracts Upon a New and Condensed Method. By Joel Prentiss Bishop, LL.D. Chicago: T. H. Flood & Co. 1887.

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the special treatises upon Agency, Bailments, Corporations, Damages, Equity Jurisprudence, Evidence, Fraud, Infancy, Limitations, Married Women, Mortgages, Negotiable Instruments, Partnership, Real Property, Sales, Statute of Frauds, Suretyship and Guaranty, Trusts, Vendor and Purchaser and Usages and Customs, or in my own exhaustive Abridgment of the whole body of the civil law, Rights, Remedies and Practice.¹

A complete collection of the decisions of all the American courts, not being easy of access to every lawyer, I have used very freely in my citations the splendid series of selected cases from all the States known as the American Decisions, the American Reports and the American State Reports where one is able to find (as a glance at the cases cited in the notes to this treatise will show) all the reported cases he is likely to need, on every branch of the law, and rich in annotations of the highest value to the practicing lawyer.

§ 5. Plan and Arrangement of this Work.—The present treatise is divided into five main parts and nineteen chapters, viz.:—

Part I. The Formation of the Contract, i. e.: What are the elements necessary to a valid contract?

Here we find that there must be an *Agreement* (Cap. I) which is either *Express* or *Implied* (Cap. II); that it must be expressed in a certain *Form* (Cap. III); that it must be founded upon a *Consideration* (Cap. IV); that it must be made by *Parties* capable of contracting (Cap. V); with their real *Consent* (Cap. VI), and that it must be for a *Legal Object* (Cap. VII).

Part II. The Operation of the Contract, i. e.: Whom does it affect, and who are the persons who may obtain rights or may be held liable under it?

¹ Rights, Remedies and Practice, at Law, in Equity and Under the Codes. A Treatise on American Law in civil cases, with a digest of illustrative cases. By

John D. Lawson, LL.D. In seven volumes. San Francisco: Bancroft-Whitney Co. 1890.

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Here we find that not only does it affect the original parties to the agreement but likewise those persons who may take the place of either of the original parties by *Assignment* (Cap. VIII).

Part III. The Interpretation of the Contract, i. e.: In what modes and by what rules is the meaning of the contract to be arrived at?

Here we find certain legal rules by which we can ascertain what the terms of the agreement were, which we call *Proof of the Contract* (Cap. IX), and certain other legal rules by which we can ascertain what those terms mean — which we call *Construction of the Contract* (Cap. X).

Part IV. The Discharge of the Contract, i. e.: In what modes does the obligation come to an end and the parties become freed from its rights and liabilities?

Here we find that the contractual tie may be loosened and the parties freed from its rights and liabilities either by *Agreement* (Cap. XI); by *Performance* (Cap. XII); by *Impossibility of Performance* (Cap. XIII); by *Operation of Law* (Cap. XIV); or by *Breach* (Caps. XV–XVI).

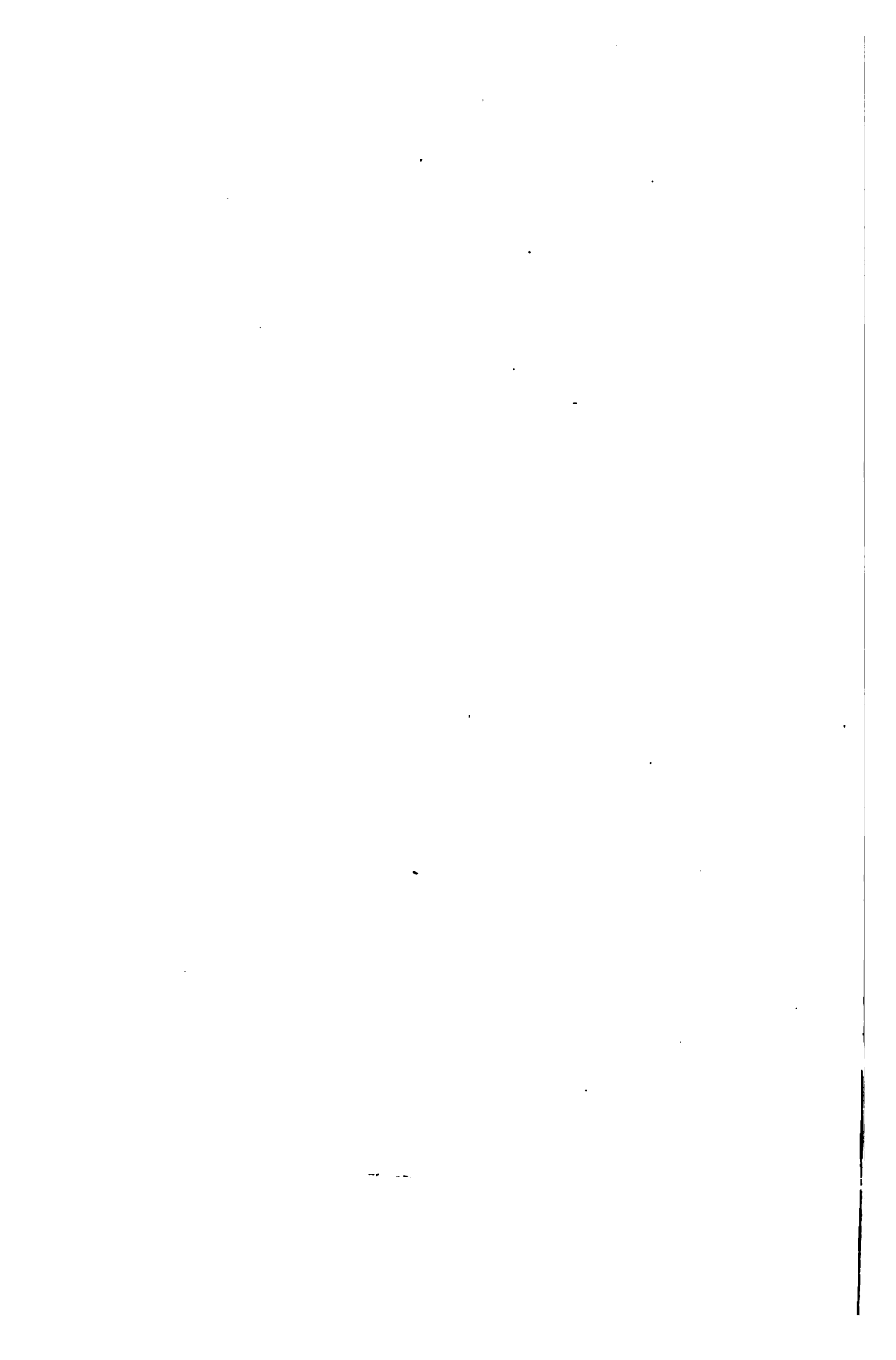
Part V. The Remedies Upon the Contract, i. e.: In what modes and to what extent may either party obtain satisfaction when the other fails to perform what he has promised?

Here we find that he may recover compensation for the loss a breach has caused him, which compensation is called *Damages* (Cap. XVII), or the court may in certain cases compel the party in default to actually perform what he promised, which is called *Specific Performance* (Cap. XVIII); and lastly that this right of action may be *Discharged* in various ways (Cap. XIX).

PART I.

THE FORMATION OF THE CONTRACT.

§ 6. INTRODUCTORY.



§ 6. Introductory. — A contract is defined by the most distinguished chief justice of the highest court in the land and the most august judicial tribunal in the world, as an agreement in which a party undertakes to do or not to do a particular thing.¹ And yet this, while correct as a mere definition, falls very far from describing the kind of agreement which is essential to a contract binding and enforceable by law. An agreement may exist and yet not be so formed between the parties as to make a valid contract; or it may be properly formed as between the parties, and yet not be so expressed in its form as to be enforceable; or it may possess these two elements and yet not contain the consideration which the law requires; or it may possess these three elements and yet not be entered into by parties legally capable of contracting; or it may possess these four elements and yet not have the necessary legal consent of the parties; or it may possess these five elements and yet be for an object which in the eye of the law is not a legal object.

Therefore, in treating of the formation of the contract, *i. e.*, the elements necessary to a valid contract, we shall consider, 1st. The agreement; either express or implied. 2d. The form required. 3d. The consideration required. 4th. The capacity of the parties. 5th. The consent of the parties. 6th. The legality of the object of the agreement. These six requisites are essential to a valid contract, for where any one of them is absent, the agreement is in some cases merely unenforceable, in some voidable at the option of one of the parties, in some absolutely void.

¹ Marshall, C. J., in *Sturgis v. Crowninshield*, 4 Wheat. 197.

CHAPTER I.

THE AGREEMENT.

SECTION 7. Agreement defined.

8. Intention must be communicated.
9. Promise defined.
10. Unenforceable promises.
11. Representations on which another acts — estoppel.
12. Agreement results from offer and acceptance.
13. Offer and acceptance must be communicated.
14. Implied acceptance from silence.
15. Acceptance must be absolute and unconditional.
16. And identical with terms of offer.
17. Effect of refusal or non-acceptance of terms of offer.
18. Offerer may prescribe time, place and conditions of acceptance.
19. But not of refusal.
20. Offer made by post.
21. Acceptance made by post.
22. By telegraph.
23. The subject of acceptance by agent reviewed.
24. Offer must be accepted by person to whom made.
25. Offer to unascertained person.
26. Same—rewards.
27. Offer may be revoked before acceptance.
28. Revocation must be communicated.
29. Acceptance makes an irrevocable contract.
30. Revocation of acceptance.
31. Offer may lapse or be determined, how.
32. Time and place.

§ 7. Agreement Defined. — Agreement consists where two persons are of the same mind and intention concerning the subject-matter. This state of mind or intention can be ascertained only by outward expressions, such as words or acts. Therefore the law excludes all questions of intention unexpressed, and imputes to a person a state of mind

or intention corresponding to the rational and honest meaning of his words and acts.¹ Whatever a man's real intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to what he proposed, and the latter on the faith of this contracts with him, the man so conducting himself is as much bound as if he had actually intended to agree to the other party's terms.²

§ 8. **Intention must be Communicated.** — The parties must communicate to one another their common intention. A secret acceptance of a proposal cannot constitute an agreement.³ If A for example, writes to B and offers to buy B's horse and B makes up his mind to accept, but never tells A of his intention to do so, he has no remedy if A buys a horse elsewhere. In *White v. Corlies*,⁴ C wrote W, "Upon agreeing to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." W immediately purchased lumber for the work and began to prepare it. The next day the proposition was countermanded. It was held that the acceptance was not binding on C, as it was a mere mental determination, unaccompanied by any act indicating to C that his proposal was accepted.

§ 9. **Promise Defined.** — In an agreement as the source of a legal contract, the matter agreed upon must import that the one party shall be bound to the other in some act or performance which the other shall have a right to enforce. This signification of a purpose to do or not to do some particular thing, is called a promise,⁵ provided always that it be accepted by the other party.⁶ The parties to a

¹ Leake Contracts, 12.

² Blackburn, J., in *Smith v. Hughes*, L. R. 6 Q. B. 607; *Freeman v. Cooke*, 2 Ex. 654.

³ *White v. Corlies*, 46 N. Y. 467; *Ramaley v. Leland*, 6 Robt. 358; *Van Valkenburg v. Rogers*, 18 Mich. 180; *Wagner v.*

Eggleston, 49 Mich. 218; *Brogden v. Metropolitan R. Co.*, L. R. 2 App. Cas. 691.

⁴ 46 N. Y. 467.

⁵ Leake Cont. 13.

⁶ For a promise not assented to by the promisee is not binding upon the

promise are called respectively the *promisor* and the *promisee*.

§ 10. **Unenforceable Promises.** — But there are several requisites to a binding promise. In the first place the intention to bind oneself must appear, for all promissory expressions do not by acceptance constitute an agreement,¹ nor do mere statements of intention, though acted upon by the party to whom they are made.² In an English case a person, in answer to a suitor for his daughter, wrote: "I shall allow her the interest on two thousand pounds, whether she remains single or marries. If the latter, I may bind myself to do it, and pay the principal at my death to her and her heirs." This was held not to create a contract because it did not import an intention to make a binding promise.³ In *Stamper v. Temple*⁴ the defendant and his family were in deep affliction at the loss of his son; he himself was laboring under the effect of severe wounds received from the same persons who had killed his son; so that when the arresting of the persons who had perpetrated the outrage was spoken of, he observed that he would give two hundred dollars to have them arrested. "What is called an offered reward," said the court "was nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the distracted state of his own mind, and that of his family; as we frequently hear persons exclaim, 'Oh! I would give a thousand dollars if such an event were to happen,' or *vice versa*. No contract can be made out of such expressions; they are evidence of strong excitement, but not of a contracting intention." So business circulars,

promisor. *McKinley v. Watkins*, 13 Ill. 140; *Brown v. Rice*, 29 Mo. 322; *Ellison v. Henshaw*, 4 Wheat. 225; *Tucker v. Woods*, 12 Johns 190; 7 Am. Dec. 305; *King v. Warfield*, 67 Md. 246; 1 Am. St. Rep. 304; *Demoss v. Noble*, 6 Iowa, 530.

¹ *Carson v. Lucas*, 13 B. Mon. 313; *Stagg v. Compton*, 31 Ind. 171.

² *Week v. Tibbold*, Roll Abr., p. 6; *Kirksey v. Kirksey*, 8 Ala. 131.

³ *Randall v. Morgan*, 12 Vesey, 67.

⁴ 6 Humph. 113; 44 Am. Dec. 296.

stating terms upon which goods may be ordered, sent to persons to attract their attention to a particular business, are not offers which become binding contracts on their acceptance by the persons addressed.¹

Secondly, the intention of the parties must refer to legal relations; it must have reference to the assumption of legal rights and duties as opposed to engagements of a social character.² One may accept a proposal to dine with another or to take a walk or go to a base ball match with him, and may even incur trouble and expense in keeping the engagement, yet as no legal consequences are contemplated by the parties to such agreements no action will lie for their breach.³ So, though a matter may have the form of a contract nevertheless if it were understood by the parties as a mere joke or piece of fun, no legal obligation could arise out of it.⁴

Thirdly, the promise must be certain in its terms, and not so indefinite and illusory as to make it impossible to say just what was promised. Therefore where A bought a horse from B promising that "if the horse was lucky to him, he would give \$25 more or the buying of another horse," it was held that this was too loose and vague to be considered in a court of law.⁵ So where A promised B that if she, a single woman, would live with him until her marriage, he would give her one hundred acres of land, without any reference to locality or value, it was held void for uncertainty.⁶ Where an employer engages a servant, promising to give him such remuneration as he, the employer, shall

¹ Lyman v. Robinson, 14 Allen, 254; Moulton v. Kershaw, 59 Wis. 316; 48 Am. R. 516; Knight v. Cooley, 34 Ia. 218; Beaupre v. P. & A. Tel. Co. 21 Minn. 155. See Smith v. Weaver, 90 Ill. 392; Chicago, etc., R. R. Co. v. Dane, 48 N. Y. 240; Lincoln v. Erie Preserving Co., 132 Mass. 129; Howard v. Industrial School, 78 Me. 230.

² Pollock Contr. 2; Erwin v. Erwin,

25 Ala. 236; Topping v. Swords, 1 E. D. Smith, 609.

³ Anson Contr. 19.

⁴ Armstrong v. McGhee, Addis. 361; Keller v. Holdeman, 11 Mich. 248; 83 Am. Dec. 737.

⁵ Guthing v. Linn, 2 B. & Ad. 222.

⁶ Sherman v. Kitsmiller, 17 Serg. & R. 45.

think right, there is no legal liability to pay anything.¹ So, in a recent case, a promise by a school trustee to a teacher to pay "good wages" was held too indefinite to found an action upon.² So, where the defendant promised the plaintiffs that if they would buy a certain store-house and stock of goods, he would "assist them by indorsing their paper and advancing them the money to carry on the mercantile business advantageously," it was held that the promise was too indefinite and uncertain to support an action.³

§ 11. Representations on Which Another Acts — Estoppel. — A representation concerning a matter of fact may also be made to another, although without any expressed or intended warranty of the truth, yet with the intention of inducing him to act upon it; and if the latter act upon it, and suffer loss by reason of it not being true, the party making the representation may be held responsible in law for the consequences; or he may be estopped from denying the truth of the representation.⁴

§ 12. Agreement Results from Offer and Acceptance. — Every agreement must necessarily result from an offer or proposal on the one side and an acceptance on the other.⁵

To illustrate:—

(a) At a sale by auction each bid is an offer of a price for the article put up for sale, which bids are successively made until one is accepted by the fall of the hammer, when the agreement is complete.⁶

¹ *Taylor v. Brewer*, 1 Maule & S. 230; *Roberts v. Smith*, 4 Hurl. & N. 315; 28 L. J. Ex. 164; *Parker v. Ibbetson*, 4 Com. B. (N. S.) 346; 37 L. J. Com. P. 236. See post, § 409.

² *Fairplay School Tp. v. O'Neill*, 26 N. E. Rep. 686.

³ *Erwin v. Erwin*, 25 Ala. 236.

⁴ *Lawson Rights*, Rem. & Fr., § 2225.

⁵ *White v. Corlies*, 48 N. Y. 467; *Connor v. Renneker*, 25 S. C. 514.

⁶ *Lawson Rights*, Rem. & Fr., § 212; *Payne v. Cave*, 3 Term. Rep. 148; *Ives v. Tregent*, 29 Mich. 390.

(b) The time-tables published by a railroad company are an offer made to all persons who apply for carriage that the trains will run as advertised.¹

(c) The publication of an advertisement of a reward for information, respecting a loss or a crime, or an oral announcement to the same effect is an offer to any person who is able to give the information asked, and on its acceptance by giving the information the agreement is complete.²

(d) The sending of an order to a merchant or manufacturer is an offer to purchase and the sending of the goods is an acceptance of the offer and creates a contract of sale.³

(e) An agreement by B to sell A his farm for \$5,000, must be the result of an offer by B to sell it for that price and an acceptance by A or an offer by A to give that sum for it and an acceptance by B.⁴

(f) The purchase of a book or a basket of fruit or any other article displayed for sale in a store is the result of the displaying his wares by the storekeeper, who says in act though not in word, "Will you buy my goods at my price?" and the customer, taking up the article with his cognizance, says, "I will."⁵

(g) The entering a street car and riding in it amounts to an agreement to carry on the usual route for the usual fare by the carrier and an agreement to pay the usual fare by the passenger, because the presence of the street car is a constant offer by the company to perform such service upon

¹ Lawson Rights, Rem. & Fr., § 1886; Denton v. Great North R. Co., 5 E. & B. 860; Sears v. R. R. Co., 14 Allen, 433; 92 Am. Dec. 780.

² Lawson Rights, Rem. & Fr., § 2230; Williams v. Cawardine, 4 B. & Ad. 621; Relf v. Page, 55 Wls. 476; 42 Am. Rep. 781; Ryer v. Stockwell, 14 Cal. 134; 73 Am. Dec. 634; Janvrin v. Exeter, 48 N. H. 83; 2 Am. Rep. 185; Hayden v. Soug-
er, 56 Ind. 42; 26 Am. Rep. 1.

³ Harvey v. Johnston, 6 C. B. 226; Briggs v. Sizer, 30 N. Y. 652; Dent v. Steamship Co., 49 N. Y. 370; Crook v. Cowan, 64 N. C. 743.

⁴ Anson Contr. 11.

⁵ Anson Contr. 11. "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

² Black. Com. 30.

its usual terms, and the man who enters the car accepts the offer and agrees to pay the usual fare for the service.¹

(h) A person who takes a seat at the dining table of a hotel offers to take a meal for the usual price charged to guests, and the proprietor accepts the proposal by furnishing the meal.²

(i) A man with the full knowledge of another does work for him, the latter knowing that he expects to be paid for it; the doing the work is a proposal and the receiving the service without dissent is the acceptance.³

(j) A offers B to pay him a certain sum of money on a future day if B will promise to perform certain services for him before that day. When B makes the promise asked for he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow him to do it and to make the payment.

(k) A sends goods to B's house and B accepts or uses the goods; B is liable on an implied contract to pay what the goods are worth. The offer is made by sending the goods, the acceptance by their use or consumption, which is in fact a promise to pay their price.

(l) A requests B to work for him for hire. On B going to work as requested, the offer is accepted unless A had prescribed in his offer some particular form of acceptance. Or A writes to B offering to re-imburse him if he will pay the taxes on certain land. B pays the taxes. This is a sufficient acceptance of the offer.⁴

From these examples it will be seen that a *proposal* may assume two forms, the *offer of a promise* and the *offer of an act*, and that *acceptance* may assume two forms also, the *giving of a promise* or the *doing of an act*. And that therefore an agreement may arise in three ways, viz.: (1)

¹ Anson. Contr. 12.

² Benj. Princ. of Contr. 18.

³ Id. DeWolf v. Chicago, 26 Ill. 443;

Huck v. Flentye, 80 Ill. 262; Day v. Caton, 119 Mass. 513.

⁴ Allen v. Chouteau (Mo.), 14 S. W. Rep. 889.

In the offer of an act for a promise, as in illustrations (f), (g), (i), (k). (2) In the offer of a promise for an act, as in illustrations (c), (d), (h), (l). (3) In the offer of a promise for a promise, as in illustrations (a), (b), (e), (j).

The simplest form of offer and acceptance, viz., the offer of a promise and its acceptance by simple assent, is not applicable to the law of contracts except in the single case of contracts under seal. The reason is that in our law no promise, which is not under seal, is binding unless the promisor obtains some benefit in return for his promise, and this benefit is called "consideration."¹ Therefore if a man says to another "I will give you \$100," or "I will do such and such a thing for you," the other by simply assenting to the proposal without doing something in return for the promise cannot create a binding contract. But if A promises B under seal that he will do a certain act or pay a certain sum, when B has assented to the proposal both are bound, and there is a contract. Until he has assented there is an offer, which, as we shall see, is irrevocable so far as A is concerned, owing to the particular form in which it was made, though it cannot bind B until he has assented to it. For a man cannot be forced to accept a benefit, though acceptance is sometimes presumed when the thing is clearly to his benefit.²

§ 13. Offer and Acceptance Must be Communicated. — From the illustrations given in the last section it must be plain that an offer and an acceptance may be by acts as well as by words.³ But it is essential that they be communicated. In *Bartholomew v. Jackson*,⁴ a farmer, seeing his neighbor's stack of wheat in danger of fire, took upon himself to remove it to a safe place, and then sued for his services. But it was ruled that as the offer to remove the stack was never communicated to the defendant there was

¹ See *post*, Cap. IV.

² *Lawson Rights, Rem. & Pr.*, § 2276.

³ *Crook v. Cowan*, 84 N. C. 743.

⁴ 20 Johns. 28; 11 Am. Dec. 237.

no contract on which he could be held. In *Taylor v. Laird*,¹ the plaintiff, who had been engaged to command the defendant's ship, threw up his command in the course of the expedition but helped to work the vessel home, and then claimed reward for services thus rendered. It was held that he could not recover. Evidence "of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time the defendant had power to accept or refuse the services.*" But in this case the defendant never had the option of accepting or refusing the services while they were being rendered, and did in fact repudiate them when he became aware of them. The plaintiff's offer, being uncommunicated, did not admit of acceptance, and could give him no rights against the party to whom it was addressed.

Nor can an acceptance, which does not go beyond an uncommunicated mental determination, create a binding contract simply because the intention to accept did in fact exist.² But when the acceptance reaches the person who made the offer it is immaterial by what mode it is sent;³ it may be by mail, by telegraph, by special messenger or the like, as well as by the words written or spoken or the acts or conduct of the one to whom the offer is made.⁴

Doubtless there may be cases in which the proposal is in such a form as not to call for a communication of the acceptance, as where it is by letter whose terms exclude the idea of the necessity of a reply in case of acceptance.

§ 14. Implied Acceptance from Silence. — Where conduct is relied upon as constituting acceptance it must be

¹ 25 L. J. Ex. 329.

² *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 282; *Slocumb v. Louty*, 1 Hemp. 451.

³ *Perry v. Iron Co.*, 15 R. I. 12; 2 Am. St. Rep. 903.

⁴ *Howard v. Daly*, 61 N. Y. 362; *Trevor v. Wood*, 28 N. Y. 307; *Schomberg v. Choney*, 8 Thomp. & C. 200; *Fox v. Turner*, 1 Ill. (App.) 153; *Duble v. Batts*, 38 Tex. 312.

something more than mere silence, it must be silence under such circumstances as to amount to acquiescence.¹ Thus consent could by no method of reasoning be presumed from silence when the offer is not communicated to the party to whom it was intended to be made, as in *Bartholomew v. Jackson*² and *Taylor v. Laird*.³ Though circumstances may exist which will impose a contractual obligation by mere silence, yet such circumstances are exceptional and rare; and no legal liability can arise out of the silence of the party sought to be affected, unless he was subject to a duty of speech which was neglected to the injury of the other party.⁴

§ 15. Acceptance Must be Absolute and Unconditional.—The acceptance must be absolute and unconditional.⁵ Thus if A offers to B to do a certain thing and B accepts conditionally or introduces some new term into his acceptance, his answer is either a mere expression of a willingness to negotiate or it is in the nature of a counter-proposal on his part.⁶ This conditional acceptance being a counter-proposal is not binding until it is accepted (and communicated) by the original proposer.⁷ In *Borland v. Guffey*,⁸ A, who was a creditor of an innkeeper whom B desired to buy out, sent word to B that if he would guaranty the innkeeper's debt to him he would refrain from attaching the property. B replied that he would do so if A would not attach *and would also keep the thing quiet*. This was satisfactory to A, but he neglected to notify B, although he refrained from attaching the property. It was held that

¹ Anson Contr. 15.

² *Supra*.

³ *Supra*.

⁴ *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6; 4 Am. St. Rep. 623.

⁵ *Eggleston v. Wagner*, 46 Mich. 610; *Hough v. Brown*, 19 N. Y. 111; *Harlow v. Curtis*, 121 Mass. 320; *Corcoran v. White*, 117 Ill. 118; *Bledeman v. O'Con-*

nor, 117 Ill. 473; 57 Am. Rep. 876; *Potts v. Whitehead*, 23 N. J. (Eq.) 512; *Brown v. R. R. Co.*, 44 N. Y. 79.

⁶ *Borland v. Guffey*, 1 Grant's Cas. 394; *Briggs v. Sizer*, 30 N. Y. 647.

⁷ *Briggs v. Sizer*, 30 N. Y. 647; *Slaymaker v. Irwin*, 4 Whart. 367; *Nundy v. Matthews*, 34 Hun. 74.

⁸ 1 Grant's Cas. 394.

there was no contract, as A's assent to the new terms in his acceptance — or counter-proposal — had not been communicated to B.

§ 16. **And Identical with Terms of Offer.**— The offer must be accepted exactly as it is made. The acceptance must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing them just as they stand:¹ for there is no contract if there is a variance of any kind between the terms of the offer and the acceptance.² In *Jordan v. Norton*³ the defendant offered by letter to buy a mare of the plaintiff if he would warrant her quiet in *harness* and the plaintiff replied that he warranted her sound and quiet in *double harness*. In an action for the price Baron Parke said: "The correspondence merely amounts to this: that the defendant agrees to give twenty guineas for the mare if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties have never contracted in writing *ad idem*." Like the conditional acceptance the acceptance at variance with the terms of the offer is a counter-proposal which to bind the party to whom the original offer was made, must be accepted.⁴ But where one makes an offer with certain conditions, and accepts acceptance not responsive to the proposal, he is bound by the contract thus made, and cannot fall back on his proposal in case of subsequent disagreement.⁵

¹ *Potts v. Whitehead*, 28 N. J. (Eq.) 512; *Eliason v. Henshaw*, 4 Wheat. 225; *Eads v. Carondelet*, 42 Mo. 113; *Bruner v. Wheaton*, 46 Mo. 363; *Corcoran v. White*, 117 Ill. 118; 57 Am. Rep. 638; *Siebold v. Davis*, 67 Iowa, 560; *Moxley v. Moxley*, 2 Metc. 309; *Martin v. Fuel Co.*, 23 Fed. Rep. 376; *Northwest Iron Co. v. Meade*, 21 Wis. 474; 94 Am. Dec. 557.

² *Baker v. Johnson Co.*, 37 Ia. 186; *Jenness v. Iron Co.*, 53 Me. 20; *Baker v. Holt*, 86 Kan. 100; *Fox v. Turner*, 1 Ill.

(App.) 153; *Hutcheson v. Blakeman*, 3 Met. Ky. 8; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *Beckwith v. Cheever*, 21 N. H. 41; *Stagg v. Compton*, 81 Ind. 171; *Bruce v. Bishop*, 43 Vt. 161; *Carr v. Duval*, 14 Pet. 77.

³ 4 M. & W. 155.

⁴ See cases cited in last section. *Sawyer v. Brossart*, 67 Ia. 678; 56 Am. Rep. 371; *Moulton v. Kershaw*, 59 Wis. 316; 48 Am. Rep. 516.

⁵ *Iron Works v. Douglass*, 49 Ark. 335

§ 17. **Effect of Refusal or Non-acceptance of Terms of Offer.**—If the offer made is rejected, the party making it is relieved from liability on that offer and the party who has rejected it cannot afterwards at his option convert the same offer into an agreement by acceptance; to do so he must have the renewed consent of the person who made the offer.¹ And a conditional acceptance or an acceptance not in accordance with the terms of the offer has the same effect; it is, as we have seen, a counter-proposal and a virtual rejection of the original offer. Therefore a subsequent acceptance of the original proposal operates only as a new counter-proposal which the original proposer may either accept or reject.² In *Hyde v. Waerch* ³ A proposed to sell a farm to B for £1,000; B said he would give £950. A refused this offer, and then B said that he was willing to give £1,000. A was no longer ready to adhere to his original proposal and B endeavored to obtain specific performance of the alleged contract. But it was held that his offer to buy at £950 in answer to A's offer to sell for £1,000 was a refusal of the offer of A and a counter-proposal and that he could not after this without A's consent hold him to his original offer.

When land is offered for sale by letter, an acceptance specifying that payment is to be made at the place of the purchaser's residence is not unconditional, as the terms of the offer entitle the vendor to payment at his own place of residence.⁴

But in order to constitute a rejection of the original

¹ *Sheffield Canal Co. v. R. R. Co.*, 3 Rail. Cas. 182; *Davis v. Parrish*, Litt. Sel. Cas. 153; 12 Am. Dec. 287.

² *Carr v. Duval*, 14 Pet. 77; *Nat. Bank v. Hall*, 101 U. S. 50; *Minn. & C. R. Co. v. Mill Co.*, 119 U. S. 147; *Connells v. Krenzel*, 41 Ill. 394; *Fox v. Turner*, 1 Ill. App. 159; *Smith v. Wetherell*, 4 Ill. App. 655; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Northwestern Iron Co. v. Meade*, 21 Wis. 474; *Clay v. Ricketts*, 66 Ia. 362; *Derrick*

v. Monette, 73 Ala. 75; *Johnson v. Stephenson*, 26 Mich. 63; *Eggleston v. Wagner*, 46 Mich. 610.

³ 8 Beav. 334.

⁴ *Baker v. Holt*, 56 Wis. 100; *Sawyer v. Brossart*, 67 Iowa, 678; *Northwestern Iron Co. v. Meade*, 21 Wis. 474; *Gilbert v. Baxter*, 33 N. W. Rep. (Ia.) 364; *Maynard v. Tabor*, 53 Me. 511; *Fenno v. Weston*, 31 Vt. 345; *Siebold v. Davis*, 67 Ia. 560.

offer there must be a distinct counter-proposition. A mere inquiry whether the offerer would change his terms, is not enough to work a rejection of the original offer and prevent a subsequent acceptance of it.¹ And an acceptance by letter has been held sufficient though it contained an inquiry as to how the remittance should be made.²

§ 18. Offerer may Prescribe Time, Place and Conditions of Acceptance. — The offerer has the right to prescribe the time, place, form or other condition of acceptance, in which case the offer can be accepted only in the way prescribed.³ Thus the offer may require that it be accepted within a certain time, in which case an acceptance after that time will be of no effect.⁴ An offer by letter may be made conditional upon an acceptance being sent by return mail and the offer must then be accepted within that interval.⁵ In some cases the words "by return mail" have been held to give a reasonable time for acceptance, and an answer mailed on the same day the offer was received, though not by the first mail leaving the city after it was received, has been considered sufficient.⁶ But a delay of three or four days is different.⁷ In *Ellason v. Henshaw*,⁸ E. & Co. offered to buy flour of H, the answer to be sent by the wagon which carried the offer. H sent a letter of acceptance by mail to another place which was not the destination of the wagon, having reason to believe that his answer would in this way reach E. & Co. more speedily. The Supreme Court of the United States decided that E. & Co. were not bound by the acceptance, as they had a right to dictate the terms on which they would purchase, and of the importance of which they were the sole judges.

¹ *Stevenson v. McLean*, 5 Q. B. Div. 346.

² *Clark v. Dales*, 20 Barb. 42.

³ *Ellason v. Henshaw*, 4 Wheat. 225.

⁴ *Longworth v. Mitchell*, 26 Ohio St. 342; *Potts v. Whitehead*, 20 N. J. (Eq.) 55; *Britton v. Phillipp*, 24 How. Pr. 111.

⁵ *Maclay v. Harvey*, 90 Ill. 525; 32 Am.

Rep. 35; *Carr v. Duval*, 14 Pet. 77; *Dunlop v. Higgins*, 1 H. L. Cas. 381.

⁶ *Palmer v. Phoenix Iron Co.* 84 N. Y. 63.

⁷ *Maclay v. Harvey*, 90 Ill. 528; 32 Am. Rep. 35; *Taylor v. Rennie*, 35 Barb. 272.

⁸ 4 Wheat. 225.

One who offers a reward may annex any conditions he chooses, and the claimant must prove his compliance with them.¹ But a substantial compliance is sufficient.²

§ 19. **But Not of Refusal.**— But though a person making an offer may prescribe a form of acceptance, he may not turn the absence of communication into an acceptance, and compel the recipient of his offer to refuse it at peril of being construed to have accepted it. An uncle offered by letter to buy his nephew's horse for £30 15s., adding, "if I hear no more about him I consider the horse is mine at £30 15s." No answer was returned to the letter, and it was held that there was no contract.³

§ 20. **Offer Made by Post.**— As between the sender of a letter and the person to whom it is addressed, the post-office is the agent of the sender, although by the regulations of the office it cannot be recalled, and is deliverable only to the address. Therefore, the delivery of a letter to the post-office for transmission is no delivery or communication to the person to whom it is addressed until actually received by him.⁴ [An offer by mail continues open until the arrival of the letter at its destination, and the offerer must suffer the consequence of any delays or mistakes on the part of the post-office.] In *Adams v. Lindsell*,⁵ the defendants offered to sell wool to the plaintiffs by letter dated September 2d, 1817. The letter was misdirected, and so did not reach the plaintiffs until September 5th; they accepted by letter posted that evening, but the defendants had in the meantime sold the wool to others. The plaintiffs sued for non-delivery of the wool, and it was argued on behalf

¹ *Blain v. Express Co.*, 69 Tex. 74; *Fitch v. Snedeker*, 38 N. Y. 248; 97 Am. Dec. 791.

² *Reese v. Dyer*, 9 Allen, 151; 85 Am. Dec. 747; *Gilkey v. Bailey*, 2 Harr. (Del.) 359; *Brennan v. Hoff*, 1 Hill. 151.

³ *Felthouse v. Bindley*, 11 C. B. (N. S.) 869.

⁴ *Frith v. Lawrence*, 1 Paige, 434.

⁵ 1 B. & Ad. 681.

of the defendants that no contract could arise until the plaintiffs' answer reached him. But the court said "that if that were so no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants *must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter.*"

§ 21. **Acceptance Made by Post.**—Where a person makes an offer, and requires or authorizes the offeree either expressly or impliedly to send his answer by post and the answer is duly posted, the contract is complete from the time the letter is mailed, and it is immaterial, as regards the contract, that afterwards the letter be delayed or altogether fail in reaching its destination, by default of the post-office or by accident in transmission. A person making an offer by letter, respecting a matter of business usually conducted through the post, is presumed to authorize the communication of the acceptance by that agency.¹ As soon as the letter is delivered to the post-office the contract is as complete as if the acceptor had put it into the hands of a messenger sent by the offerer himself or his agent to deliver the offer and receive the acceptance. The contract is properly held to be complete when the acceptor has mailed the letter of acceptance, because this is an act

¹ *Talloe v. Ins. Co.*, 9 How. 390; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 263; *Moore v. Pierson*, 6 Iowa, 279; 71 Am. Dec. 409; *Bryant v. Booze*, 55 Ga. 438; *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Vassar v. Camp*, 11 N. Y. 441; *Chiles v. Nelson*, 7 Dana, 281; *Kempner*

v. Cohn, 47 Ark. 519; 58 Am. Rep. 775; *Hunt v. Higman*, 70 Iowa, 406; *Linn v. McLean*, 80 Ala. 360; *Washburn v. Fletcher*, 42 Wis. 152; *Minn. Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Howard v. Daly*, 61 N. Y. 362; *Haas v. Myers*, 111 Ill. 426.

contemplated and impliedly authorized by the offerer as the mode of manifesting the intention of the acceptor to close with the offer. The acceptor by this act does all that is requisite in the usual course of business—he thereby puts the letter of acceptance beyond his control, and he is not answerable for the casualties of the mail service.¹

But the offerer may always, if he chooses, make the formation of the contract dependent upon the actual communication to himself of the acceptance.² Where an insurance is to attach from the time of a deposit of a letter in the post-office, this means a letter duly stamped.³

§ 22. By Telegraph.—The deposit at the office of a telegram accepting an offer made in that way completes the contract without regard to the time of its receipt by the other party.⁴

¹ The English courts did not at once arrive at the American doctrine. [In *Adams v. Lindsell*, 1 B. & Ald. 681, it was ruled that the post-office was the agent of the offerer, and that he was liable for its defaults.] In *Dunlap v. Higgins*, 1 H. L. Cas. 381," says Mr. Anson (Contr. 23), "Lord Cottenham held, though it was not necessary to the decision of the case, that the posting of a letter of acceptance concluded the contract whatever might afterwards befall the letter. But the Court of Exchequer, in a later case, *British Am. Tel. Co. v. Colson*, L. R. 6 Ex. 108, tried hard to escape the consequences of the rule, and Kelly, C. B., laid it down that the contract was not binding till the letter of acceptance was received, but that when it was received its operation related back to the moment of its posting. This decision was virtually overruled in *Harris' Case*, L. R. 7 Ch. 587; as to the moment when the contract was complete, but Mellish, L. J., said that though 'complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act

on the assumption that the offer has not been accepted.' But it is now settled, in *Household Fire Insurance Company v. Grant*, 4 Ex. Div. 216, that the parties are bound, from the moment the letter is put in course of transmission, by a contract the existence of which is unaffected by the subsequent fate of the letter. The contract does not remain, up to the moment the acceptance is received, in the state of suspended animation contemplated by Kelly, C. B.; nor is it subject to the condition subsequent suggested by Mellish, L. J." Street letter-boxes are a legal part of the post-office system; and a letter deposited in one of these boxes is considered as being delivered or mailed at the post-office. *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597.

² *Lewis v. Browning*, 130 Mass. 173; *Haas v. Myers*, 111 Ill. 421; *Vassar v. Camp*, 11 N. Y. 641.

³ *Blake v. Ins. Co.*, 67 Tex. 160; 60 Am. Rep. 115.

⁴ *Tuttle v. Jackson*, 38 N. Y. 309; *Minn. Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Schorbey v. Cheney*, 3 Hun, 677; *Trevor v. Wood*, 41 Barb. 255; 36 N. Y. 307; 93 Am. Dec. 511; *Calhoun v. Atchison*, 4 Bush, 261; 96 Am. Dec. 299.

§ 23. The Subject of Acceptance by Agent Reviewed.—
From the foregoing sections we draw these conclusions: That the acceptance of an offer must be communicated to the offerer: that it is communicated to him when it is delivered to his agent or messenger: that the post-office and telegraph are his agents respectively when he expressly makes them so as by requesting a reply by mail or telegraph or when he impliedly makes them so by using these agencies to make his offer; but that the offerer may if he chooses make the acceptance conditional upon its actual receipt by him.

A few simple illustrations will suffice:

(1) A sends an offer to B by his, A's, messenger, into whose hands B delivers his acceptance. (2) A makes B an offer by mail requesting a reply by mail. B mails his acceptance. (3) A makes an offer to B by mail saying nothing as to how the acceptance is to be made. B mails his acceptance. (4) A telegraphs B an offer adding, "wire me your reply." B hands his acceptance to the telegraph company. (5) A telegraphs B an offer without more. B hands his acceptance to the telegraph company.

In all these cases the acceptance is "communicated" to A and the contract is complete, though A never receives any of the acceptances.

(6) C sends an offer to D by his, C's, messenger. D examines it and immediately sends his own clerk or servant with his acceptance to C. (7) C sends an offer to D by his servant and D immediately mails him his acceptance. (8) C makes an offer to D by mail, and D dispatches his clerk to C with his acceptance. (9) C makes an offer to D by mail and D telegraphs his acceptance to C. (10) C wires an offer to D and D mails his acceptance to C. (11) C makes an offer to D by mail conditional on the acceptance being received by him by a certain day. D mails his acceptance to C.

In all these cases there is no communication of the acceptance to C until he actually receives it, and if it is lost on the way there is no contract. These cases must not be confounded with an offer made accompanied by an express direction that the acceptance is to be sent by the messenger who leaves the offer, or by mail or by telegraph,

for here if the offeree accept in a different manner — as, for example, if directed to reply by the messenger he replies by mail, or directed to reply by mail he replies by telegraph — the question of time of communication becomes immaterial, as the offer has lapsed by failure to comply with its conditions.¹

§ 24. Offer Must be Accepted by Person to Whom Made. — An offer made to some ascertained and definite person can be accepted by that person and no one else. Thus an offer made to A and accepted by B, unknown to the offerer or without his consent, does not make a contract.² And similarly an offer is not assignable.³

§ 25. Offer to Unascertained Person. — An offer may be made to all the world, and the acceptance by any one of the public completes the contract, as where a street car runs on the street, or a merchant displays his goods labeled to be sold at a certain price, or a railroad company advertises that it will run its train on certain days or at certain hours. So when a promise is made to any one who will do a certain act, the person doing it is entitled to enforce it,⁴ as where persons advertised that they would redeem certain bills of a bank, it was held a promise to every one that heard of it.⁵ But though an offer need not be made to an ascertained person, no contract can arise until it has been accepted by an ascertained person.

§ 26. Same — Rewards. — The proposal by way of advertisement of a reward for the rendering of certain services addressed to the public at large, becomes a contract

¹ *Anie*, § 18.

² *Boulton v. Jones*, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28. See *post*, § 213; MISTAKE.

³ *Id.* *Leake Contr.* 13.

⁴ *Bull v. Talcot*, 2 Root, 119; 1 Am.

Dec. 62; *Walsh v. St. Louis Ex. Co.*, 70 Mo. 459; *Long v. Battle Creek*, 39 Mich. 323; 33 Am. Rep. 384; *Babcock v. Raymond*, 2 Hilt. 61; *Patton v. Hassinger*, (11) Pa. St. 305.

⁵ *Tarbell v. Stevens*, 7 Ia. 163.

to pay the reward so soon as an individual renders the services, but not before.¹ And the effect is the same where the offer is made orally.² In *Reif v. Paige*,³ a man standing in front of a burning building shouted to the crowd: "I will give five thousand dollars to any person who will bring the body of my wife out of that building, dead or alive." This was held a binding contract with one of the crowd who entered the building and brought out the woman.

The offer, being a mere proposal, may of course be revoked at any time before acceptance by performance.⁴ In Massachusetts, it is held that an offer is only in force for a reasonable time after it is made,⁵ while in other States it has been ruled that the offer continues open until it is revoked.⁶ But it may be withdrawn at any time; and the fact that an individual who claims for services afterwards performed under it did not know of the withdrawal when he rendered the service, is immaterial.⁷

There is a conflict in the cases on the question whether it is necessary that a person claiming a reward should have had notice at the time he performed the service that the reward had been offered, some decisions maintaining that it is,⁸ others that it is not.⁹

¹ *Williams v. Cawardine*, 4 Barn. &c. Adol. 631; *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634; *Reif v. Page*, 55 Wis. 496; 43 Am. Rep. 731; *Morrell v. Quarles*, 35 Ala. 544; *Hanson v. Pike*, 16 Ind. 140; *Pierson v. Morch*, 82 N. Y. 503; *Janvrin v. Exeter*, 48 N. H. 83; 2 Am. Rep. 183; *Besse v. Dyer*, 9 Allen, 151; 85 Am. Dec. 747; *Wentworth v. Day*, 3 Met. 332; *First Nat. Bk. v. Hart*, 55 Ill. 63; *County v. Roberson*, 85 Ill. 174; *Pierson v. Morch*, 82 N. Y. 503; *Cummings v. Gann*, 52 Pa. St. 484.

² *Hayden v. Souger*, 56 Ind. 43; 26 Am. Rep. 1.

³ 55 Wis. 496; 43 Am. Rep. 731.

⁴ *Cunningham v. Gann*, 52 Pa. St. 484; *Hanson v. Pike*, 16 Ind. 140.

⁵ *Loring v. City of Boston*, 7 Met. 409.

⁶ *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634; *In re Kelly*, 39 Conn. 159.

⁷ *Shuey v. United States*, 92 U. S. 73.

⁸ *Howland v. Lounds*, 51 N. Y. 604; 10 Am. Rep. 654; *City Bank v. Bangs*, 2 Edw. Ch. 95; *Marion v. Treat*, 37 Conn. 96; 9 Am. Rep. 307; *Hewitt v. Anderson*, 56 Cal. 476; 38 Am. Rep. 65; *Stamper v. Temple*, 6 Humph. 113; *Fitch v. Snedaker*, 38 N. Y. 248; 97 Am. Dec. 791.

⁹ *Dawkins v. Sappington*, 26 Ind. 199; *Crawshaw v. Roxbury*, 7 Gray, 377; *Eagle v. Smith*, 4 Houst. 293; *Russell v. Stewart*, 44 Vt. 170; *Auditor v. Ballard*, 9 Bush. 573. Other questions in the law of contract have arisen on the subject of rewards. Thus while the performance of the terms of the offer is a good consideration for the promise (*Morrell*

§ 27. **Offer May be Revoked Before Acceptance.**— Since an offer whose acceptance has not been communicated to the offeror does not constitute an agreement and cannot bind him,¹ it follows that it may be revoked by him at any time before it is so accepted.² At an auction sale the bid is not binding until assented to, which assent is signified on the part of the seller by knocking down the hammer. Therefore a bid may be withdrawn at any time before the hammer goes down.³

A party may revoke his offer even if the offer give a definite time for acceptance, for the agreement to keep the offer open is without consideration.⁴ But where the agreement is itself founded on a valuable consideration,— as where in consideration of a certain sum of money an option to purchase is given to another for a certain time—there it has been laid down that the offer cannot be retracted during that time.⁵ But this position is open to criticism, for the reason that there can be no meeting of the minds of the parties after the offer has been withdrawn and the retraction communicated to the other

v. Quarles, 35 Ala. 544), even where the offeror had no interest in the performance of the services (*Furman v. Parke*, 21 N. J. L. 310), it is generally held that a reward cannot be claimed by a public officer whose duty it was to do what the reward offered a premium for doing (*Stampfer v. Temple*, 6 Humph. 113; *Hayden v. Songer*, 56 Ind. 42; 26 Am. Rep. 1; *Pool v. Boston*, 5 Cush. 219; *Means v. Hendershoot*, 24 Iowa, 78; *Gillmore v. Lewis*, 12 Ohio, 231; *Hatch v. Mann*, 15 Wend. 44; *City Bank v. Banks*, 2 Edw. Ch. 95; *In re Russell*, 51 Conn. 577; 50 Am. Rep. 55); provided it be clear that the matter was within his official duty. *Pille v. New Orleans*, 19 La. Ann. 274; *Gregg v. Pierce*, 53 Barb. 387; *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315; *Chicago, etc., R. R. Co. v. Sebring*, 16 Ill. App. 181.

¹ *Stitt v. Huidekopers*, 17 Wall. 384; *Ueberroth v. Riegel*, 71 Pa. St. 280; *Stuart*

v. R. R. Co., 32 Gratt. 146; *Gilman v. Kibler*, 5 Humph. 19; *Rutledge v. Greenwood*, 2 Dessau, Eq. 389; *Strasburg R. Co. v. Echlemacht*, 21 Pa. St. 220; 60 Am. Dec. 49.

² *Crocker v. R. R. Co.*, 24 Com. 261; *Werden v. Woodruff*, 38 Mich. 130; *Boston, etc., R. Co. v. Bartlett*, 3 Cush. 224; *Quick v. Wheeler*, 78 N. Y. 300. An offer to several may be revoked at any time before it is accepted by all. *Benton v. Shotwell*, 13 Bush. 271.

³ *Payne v. Cave*, 3 Term. Rep. 148; *Ives v. Tregent*, 29 Mich. 390.

⁴ *Minneapolis, etc., Ry. Co. v. Mill Co.*, 119 U. S. 149, 151; *Dickinson v. Dodds*, 2 Ch. D. 463; *Boston, etc., R. R. Co. v. Bartlett*, 3 Cush. 224; *Larmon v. Jordan*, 56 Ill., p. 206; *Schenectady Stove Co. v. Holbrook*, 101 N. Y., p. 49; *Esbridge v. Glover*, 5 Stew. & P. 264; 26 Am. Dec. 344; *Werden v. Woodruff*, 38 Mich. 130.

⁵ *Stitt v. Huidekopers*, 17 Wall. 385.

party. There can be no contract of sale in such a case, though the retraction would be a breach of the contract to leave the offer open and the measure of damages would be the same.¹

§ 28. **Revocation Must be Communicated.**—The revocation of the offer must be communicated to the person to whom the offer was made before or at the time of his communicating the acceptance.² Where the parties are in immediate communication, any overt act, indicating that the proposer changed his intention, as a sale of the property in question to another, amounts to a withdrawal, and, in the opinion of some courts even though notice thereof is not brought to the knowledge of the acceptor.³ Other courts hold that notice of the withdrawal is essential, without which the offer may be regarded as continuing and subject to acceptance within the prescribed time.⁴

Where the negotiations are by mail, the offer is presumed to have been renewed during every moment of the time limited, and upon this presumption the acceptor has the right to rely and conclude the contract by acceptance at any time before receiving notice of a withdrawal.⁵ If an offer be sent by letter through the post, although by the regulations of the office the sender cannot recall his letter, yet he may by other means, if possible, withdraw the offer before it is accepted.⁶ A second letter sent by the same post, and delivered at the same time with the first letter, revoking the offer, would be sufficient.⁷ But a revocation

¹ Tiedeman Sales, § 41.

² Crocker v. R. R. Co., 24 Conn. 261; Faulkner v. Hebard, 26 Vt. 452; McCotter v. New York, 25 Barb. 609; 37 N. Y. 325; Boston, etc., R. Co. v. Bartlett, 3 Cush. 234; Werden v. Woodruff, 38 Mich. 180.

³ Bean v. Barbank, 16 Me. 458; Gillespie v. Edmunston, 11 Humph. (Tenn.) 533; Tucker v. Woods, 12 Johns. 190.

⁴ Boston, etc., R. Co. v. Bartlett, 3 Cush. 225; Houghwout v. Boisabuin, 18

N. J. Eq. 318; Eskridge v. Glover, 5 S. & P. (Ala.) 264; 26 Am. Dec. 344; School Directors v. Trefethren, 10 Brad. (Ill.) 127; Cheney v. Cook, 7 Wis. 413.

⁵ 1 Parsons on Cont. 484; Benjamin on Sales, § 44; Larmon v. Jordan, 56 Ill. 204; Moore v. Pierson, 6 Iowa, 278; Hamilton v. Lycoming Ins. Co., 5 Barr, 339; Averill v. Hedge, 12 Conn. 434.

⁶ Newcomb v. De Roos, 2 E. & E. 271.

⁷ Dinmore v. Alexander, 9 Shaw & D. 190.

of the offer not communicated to the person to whom the offer has been made, or communicated to him after he has accepted the offer, is altogether inoperative; as in the case of a letter of revocation not delivered until after the offer contained in a former letter has been accepted, although it may have been posted before the acceptance of the offer.¹

The distinction taken above between contracts where the parties are in direct communication and contracts made through the medium of the post-office is not satisfactory, and the clear weight of authority is to the effect that no withdrawal of a proposal before the time allowed has elapsed is effectual until knowledge of that withdrawal is in some way communicated to the person receiving the proposal. "No formal notice is necessary to constitute a withdrawal. It is sufficient that the person making the offer does some act inconsistent with it, as for example, sells the property in question to another purchaser and that the person to whom the offer was made has knowledge of such act."²

§ 29. Acceptance Makes an Irrevocable Contract. — An offer binds no one, and may be revoked or lapse before acceptance. But acceptance before revocation or lapse supplies the element of agreement and binds both parties to the fulfillment of the terms of the contract. It changes the character of the offer, making it an irrevocable promise.³

§ 30. Revocation of Acceptance.— An acceptance may be revoked by a communication to that effect before the acceptance is received, but not after.⁴ In Scotland it has been held that if notice of the retraction of an acceptance

¹ *Wheat v. Cross*, 31 Md. 79; 1 Am. Rep. 28; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 342; *Stockham v. Stockham*, 32 Md. 196; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; *Kempner v. Cohn*, 47 Ark. 519.

² *Pomeroy Contr.*, § 61.

³ *Thornton v. Thornton*, 1 Oush. 91; *Friede v. Royal Ins. Co.*, 50 N. Y. 243; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339.

⁴ *Potter v. Sanders*, 6 Hare, 1; *Com. Ins. Co. v. Hallock*, 27 N. J. (L.) 645; 72 Am. Dec. 380.

is received before or simultaneously with the receipt of the notice of acceptance, the contract is not binding. But the American and English rule is that the contract is complete when the letter or telegram of acceptance is dispatched, which cannot be affected by any subsequent retraction of its acceptance though received by the offerer before the acceptance is in his hands.¹

§ 31. **Offer may Lapse or be Determined, how.** — Since an offer may be turned into a contract by acceptance it is important to know how this liability may be terminated. And the modes in which an offer may lapse or be determined before acceptance are, (a) By revocation, (b) by rejection, (c) by efflux of time, (d) by breach of condition, (e) by death, (f) by change of circumstances.

(a) We have seen that an offer, unaccepted, creates no legal rights; and that it may be withdrawn before acceptance;² but it seems that an offer made under seal cannot be revoked, and that even though uncommunicated to the party to whom it is intended to be made, it remains open for his acceptance when he becomes aware of it.³

(b) The rejection by the party to whom it is made terminates the offer, and it cannot be afterwards accepted by him without the renewed consent of the offerer.⁴

(c) We have seen that a limitation of time for which an offer is to run is equivalent to the withdrawal of the offer at the end of the time named.⁵ Where the party making the offer has not prescribed or specified a time within which it may be accepted, the offer is determined by lapse of a reasonable time.⁶ What is a reasonable time depends on

¹ Tiedeman Sales, § 42.

² *Ante*, § 27.

³ Anson Contr. 25; *Xenos v. Wickham*, L. R. 2 H. L. 296.

⁴ *Ante*, § 17.

⁵ *Ante*, § 18; *Longworth v. Mitchell*, 26 Ohio St. 324, 342; *Potts v. Whitehead*, 30 N. J. Eq. 55, 59.

⁶ *Chicago, etc., R. R. Co. v. Dane*, 43 N. Y. 241; *Loving v. City of Boston*, 7 Met. 409; *Sanford v. Howard* 29 Ala. 684; 68 Am. Dec. 101; *McCurdy v. Rogers*, 31 Wis. 197; *Mizell v. Burnett*, 4 Jones, 249; 69 Am. Dec. 744; *Keck v. McKinley*, 98 Pa. St. 616; *Martin v. Black*, 21 Ala. 721; *Datterman v. Morford*, 76 N. Y. 622;

the nature of the proposal and the situation of the parties.¹ Parol evidence of material facts and circumstances, known to the parties at the time, is admissible to assist in determining what would constitute a reasonable time, but when a written proposition is to be accepted within a reasonable time, parol evidence is not admissible to show that the parties agreed that the proposal should remain open for any specified time.² The proposer may, by his conduct, estop himself from setting up that the acceptance was not sent within a reasonable time.³ Where a person makes an offer by mail requesting, or by the nature of the business having the right to expect an answer by return mail, the offer can only endure for a limited time⁴ and it is accompanied by an implied stipulation that the answer shall be sent by return mail or at least within twenty-four hours from the time the offer is received.⁵

(d) Failure to comply with a condition in the offer as to the mode of acceptance causes the offer to lapse. This includes the case of an offer limited to a certain time and also all cases where the proposer has prescribed the place, form or other condition of an acceptance.⁶

(e) The death of either party before acceptance of the offer terminates it.⁷ The continuance of an offer is in the nature of a constant repetition of it, which necessarily requires some one capable of making a repetition.⁸

Stone v. Harman, 31 Minn. 512; Ferrier v. Storer, 63 Ia. 484.

¹ Morse v. Bellows, 7 N. H. 549; 28 Am. Dec. 372. See Averill v. Hedge, 12 Conn. 424, where a delay of forty-eight hours was held unreasonable; Trounstine v. Sellers, 35 Kan. 447, where one month was held unreasonable, the parties living in distant cities. Ramsgate Hotel Co. v. Montifore L. R. 1 Ex. 107; Larrmon v. Jordan, 56 Ill. 204; Minn. Oil Co. v. Lead Co., 4 Dill. 431. An acceptance of an offer to sell real estate five days after it was made was held within a reasonable time in Kempner v. Cohn, 47 Ark. 519.

² Stone v. Harman, 31 Minn. 512; Mactier v. Frith, 6 Wend. 103.

³ Batterman v. Morford, 76 N. Y. 632.

⁴ Ferrier v. Storer, 63 Ia. 484; 50 Am. Rep. 752.

⁵ Macley v. Harvey, 90 Ill. 536; Palmer v. Ins. Co., 84 N. Y. 63; Carr v. Duval, 14 Pet. 82; Ortman v. Weaver, 11 Fed. Rep. 362.

⁶ See ante, § 18.

⁷ Holfenstein's Estate, 77 Pa. St. 533; Wallace v. Townsend, 43 Ohio St. 537; Pratt v. Trustees, 23 Ill. 478; Frith v. Lawrence, 1 Paige, 434.

⁸ Pratt v. Trustees, 23 Ill. 478.

Hence an acceptance communicated to the representatives of the maker of an offer cannot bind him. And since an offer unaccepted creates no rights, it can transmit none to the representatives of the person to whom the offer is made, and they have no power to accept it on behalf of his estate.¹ But in the case of contracts made through the mail where, as we have seen, the offerer by using the post-office makes it his agent to receive the acceptance, the death of either party after the acceptance was mailed but before the letter could reach the offerer, would not affect the case, the contract being complete the moment the acceptance was mailed.²

(f) An offer may lapse from a change of the circumstances under which it was made. The insanity of the offerer,³ or notice of dissolution of a partnership which had made the offer, would certainly determine it.⁴ In a recent English case,⁵ a person made an application to insure his life with an insurance company. The company assented to an insurance on the basis of his proposal, but with a condition that there was to be no insurance made until the first premium was paid. Before the first premium was paid he met with an accident from the effects of which he shortly died; but after the accident and before his death the premium was tendered on his behalf. The company having learned the altered character of the risk, refused to grant a policy, and the court held that it was not bound to do so. The insurance company had made an offer, and the tender of the premium, circumstances remaining the same, would have constituted an acceptance of the offer and turned it into a promise. Circumstances changed, and it was open to the company to say that, as it was no longer possible for the offer to be accepted under the conditions in which it was

¹ *Sutherland v. Perkins*, 75 Ill. 338.

² *Mactier v. Frith*, 6 Wend. 108; 21 Am. Dec. 262.

³ *Beach v. First M. E. Church*, 96 Ill. 177.

⁴ *Goodspeed v. Waird Plow Co.*, 45 Mich. 322.

⁵ *Canning v. Farquhar*, 16 Q. B. Div. 737.

made, the offer lapsed, and they were entitled to refuse the tendered premium as amounting to a new offer to insure.

§ 32. *Time and Place.* — The contract arising from agreement dates from its acceptance and not from the time of the offer.¹ It is considered as made at the place where the acceptance is given.²

¹ Leake Contr. 48.

² Leake Contr. 49; *Dod v. Bonafee*, 6 La. Ann. 563; 54 Am. Dec. 565.

CHAPTER II.

EXPRESS AND IMPLIED CONTRACTS.

SECTION 33. Contracts are express or implied.

(a) Implied Contracts.

- 34. From acceptance of goods or services.
- 35. Agreement implied from request.
- 36. Without request or assent no agreement.
- 37. Unavoidable acceptance.
- 38. Services presumed to be for hire.
- 39. Deed of land implied from possession.

(b) Contracts Created by Law.

- 40. General rules.
- 41. Void or voidable express contract.
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- 43. Contract created from a tort.
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- 46. Voluntary payments.
- 47. Legal process.
- 48. Effect of protest.
- 49. Money equitably belonging to another.
- 50. Failure of consideration.
- 51. Money paid for use of another.
- 52. Payment under mistake of fact.
- 53. Payment under mistake of law.
- 54. Money paid for illegal purpose.

(c) Contracts Implied from Express Ones.

- 55. Introductory.
- 56. Usages of trade.
- 57. In contracts of sale.
- 58. In contracts of agency and service.

§ 33. Contracts are Express or Implied. — According to the manner in which the agreement is formed, contracts are either express or implied, an express contract being

proved by words, written or spoken, expressing an actual agreement of the parties.

(a) An implied contract is one which is proved by circumstantial evidence manifesting the intention of agreement. The only difference between an express and an implied contract is in the mode of proof.¹ Whether the contract be proved by evidence, direct or circumstantial, the legal consequences resulting must be the same.²

(b) Contracts are also said to be implied when they are raised by law from facts and circumstances independent of agreement, and where the promise if it can really be said to be implied at all is an implication of law only, and has no existence in fact. Hence it is better to call this class "contracts created by law" rather than by using the same phraseology to confuse them with the implied contracts first described (a).

(c) Contracts may also be of a mixed character in respect of the mode of making them; that is to say, partly expressed in words, and partly implied from the acts of the parties and circumstances and necessities of the case. What is implied in an express contract is as much a part of it as what is expressed. And every contract must be construed as if those terms which the law will imply were expressly introduced into it.³

(a) *Implied Contracts.*

§ 34. From Acceptance of Goods or Services.—Where a man offers his labor or goods under such circumstances

¹ Denman, C. J., in *Church v. Imp. Gas Light Co.*, 6 Ad. & Ell. 846.

² *Marzetti v. Williams*, 1 Barn. & Adol. 425; *Day v. Caton*, 119 Mass. 513; 20 Am. Rep. 347; *Chilcott v. Trimble*, 13 Barb. 502; *Seals v. Edmonson*, 73 Ala. 235; 49 Am. Rep. 51. "Whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and careful the

one of them would make a promise to the other it may properly be inferred that both of them understood that such a promise was given and accepted." *Esher, M. R.*, in *Ex parte Ford*, 18 Q. B. Div. 307.

³ *Whincup v. Hughes*, L. R. 6 Q. P. 84; *Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall. 276.

that he obviously expects to be paid for them, the contract arises when the labor or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them.¹ "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."² If a person continues to receive a paper or periodical sent through the post-office, he is liable for the subscription price.³

§ 35. **Agreement Implied from Request.**—An express request by one to another to do something for him implies an agreement on his part to pay him what his services are reasonably worth.⁴ But a mere request (whose terms do not imply any promise to pay)⁵ is not sufficient to bind one, where the service is not for his benefit or there is no legal liability on him to have the labor performed.⁶

§ 36. **Without Request or Assent no Agreement.**—A person cannot make another his debtor, for money advanced or services rendered, without the consent of the party benefited. There must be a previous request, express or implied, or an assent or sanction given after the money is paid or the act done.⁷ So no agreement can be

¹ *Lawson Rights Rem. & Pr.*, § 2262; *Trustees v. Allen*, 14 Mass. 175; *Handy v. Clark*, 4 Houst. 16; *Goodwin v. Union Screw Co.*, 34 N. H. 373; *Low v. R. R. Co.*, 45 N. H. 379; *Chiniquy v. Deliere*, 37 Ill. 237; *Christie v. Sanger*, 44 N. H. 298; *DeWolf v. Chicago*, 28 Ill. 443; *Angelo v. Sewal*, 14 Cal. 402; *Fraylor v. Sonora M. Co.*, 17 Cal. 594; *Eyan v. Dayton*, 25 Conn. 188; 65 Am. Dec. 560; *Robinson v. Cushman*, 2 Denio, 149; *Sprague v. Waldo*, 38 Vt. 137; *Nemmo v. Walker*, 14 La. Ann. 581; *Watson v. Richmond College*, 41 Mo. 302; *Hart v. Hess*, 41 Mo. 441; *Morris v. Barnes*, 35 Mo. 412; *Bennett v. Stephens*, 8 Oregon, 444.

² *Hoardley v. McLaine*, 10 Bing. 422.

³ *Ward v. Powell*, 3 Harr (Del.), 379;

Fogg v. Portsmouth Athenaeum, 44 N. H. 115; 63 Am. Dec. 191.

⁴ *Weeks v. Holmes*, 28 Ill. 423; *James v. Bixby*, 11 Mass. 34; *Lewis v. Trickey*, 20 Barb. 387; *Beall v. Van Bibber*, 19 La. Am. 424; *Van Arman v. Byington*, 38 Ill. 443; *Daugherty v. Whitehead*, 31 Mo. 265; *Weston v. Davis*, 24 Me. 374.

⁵ *White v. Martin*, 38 Ala. 174.

⁶ *Smith v. Watson*, 14 Vt. 533; *Batchelder v. McKenney*, 36 Me. 555; *Norris v. Dodge*, 23 Ind. 190; *Williams v. Bushell*, 37 Miss. 682; 75 Am. Dec. 38; *Boyd v. Sappington*, 4 Watts. 247.

⁷ *Bartholomew v. Jackson*, 20 Johns. 28; 11 Am. Dec. 237; *Watkins v. Trustees of Richmond College*, 41 Mo. 302; *Williams v. Miller*, 1 Wash. 105; *Davis*

implied from a consideration performed against the will of the other party, though for his benefit¹. Thus where A, without authority from a municipal corporation, dumped earth, which he desired to deposit somewhere, in an old canal which the district wanted filled, it was held, that the service being a voluntary one, no recovery therefor could be had.²

§ 37. Unavoidable Acceptance.—Where the person to whom such an offer is made has no opportunity of accepting or rejecting the thing offered, an acceptance which he cannot help will not bind him.³ As remarked by Pollock, C. B.: “Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another’s shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?”⁴

§ 38. Services Presumed to be for Hire.—Where services are rendered by one for another they are presumed to be for hire and not gratuitous.⁵ But there is no presumption of this kind where the parties are members of the same family or near relatives,⁶ but clear and satisfactory proof must be given of a contract to pay, or the circum-

v. Breon, 1 Ariz. 240; *Alton v. Mulledy*, 21 Ill. 76.

¹ *Stokes v. Lewis*, 1 Term Rep. 20; *British Empire Shipping Co. v. Somerset*, El. D. & E. 333; *Frear v. Hardenberg*, 5 Johns. 272; 4 Am. Dec. 356.

² *Boston v. District of Columbia*, 19 Ct. of Cl. 31.

³ *Taylor v. Laird*, 35 L. J. (Ex.) 329; *Thornton v. Sturgis*, 38 Mich. 638; *Bartholomew v. Jackson*, 20 Johns. 28; 11 Am. Dec. 237; *Kenan v. Holloway*, 16 Ala. 53; 50 Am. Dec. 162; *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329; *Force v. Haines*, 17 N. J. L. 385; *White v. Jones*, 14 La. Ann. 681; *James v. O'Driscoll*, 2 Bay, 101; *Tascott v. Grace*, 12 Ill. (App.) 639; *Muscott v. Stubbs*, 24 Kan. 520; *Caldwell v. Eneas*, 2

Mill, 348; 12 Am. Dec. 681; *Allen v. Richmond College*, 41 Mo. 302; *Levee Commrs. v. Harris*, 20 La. Ann. 201; *Watson v. Ledoux*, 8 La. Ann. 68; *Hazlip v. Leggett*, 6 S. & M. 326; *Morris v. Barnes*, 35 Mo. 412; *Dunbar v. Williams*, 10 Johns. 249.

⁴ *Anson Contr.* 91.

⁵ *Lawson Presumptive Ev.*, 47.

⁶ *Lawson Presumptive Ev.*; *Keegan v. Malone*, 62 Ia. 208; *Webster v. Wadsworth*, 14 Ind. 283; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Bowen v. Bowen*, 2 Bradf. 336; *Carpenter v. Weller*, 15 Hun, 184; *Conger v. Van Aernum*, 43 Barb. 602; *Patterson v. Patterson*, 13 Johns. 379; *Ayres v. Hull*, 5 Kas. 419; *Hays v. McConnell*, 42 Ind. 285.

stances must be strong of an intention that compensation should be made.¹ Where services are rendered without any expectation of compensation and accepted with that understanding, a promise to pay for them cannot be implied.² So where they are rendered in the expectation or hope of receiving in return a gift or bequest, if the party benefited die without making any such provision no action lies,³ unless he actually agrees to pay for them in this way or the circumstances show that such was the intention of both parties.⁴

§ 39. Deed of Land Implied from Possession. — Though a deed is required, as we shall see, to convey real estate, yet where none is in existence, it will be presumed from long possession of the land that the party or his grantor took by virtue of a lawful conveyance.⁵

(b) *Contracts Created by Law.*

§ 40. General Rules. — A promise will be implied or created by the law where equity and good conscience require one, even though none was expressly made.⁶ Stated in another form: Where the law lays on one a duty to another, it creates a promise by the former to discharge the duty.⁷ And the law creates the promise even against the party's express declaration and protest. A husband, for example,

¹ Duffey v. Duffey, 44 Pa. St. 397; Bash v. Bash, 9 Pa. St. 260; Markey v. Brewster, 17 Hun, 16; Andrus v. Foster, 17 Vt. 556; Green v. Roberts, 47 Barb. 521; Guild v. Guild, 15 Pick. 129; Fitch v. Peckham, 16 Vt. 150; Ridgway v. English, 23 N. J. (L.) 409.

² Morris v. Barnes, 35 Mo. 412; Hertzog v. Hertzog, 39 Pa. St. 463; Zerrahn v. Ditson, 117 Mass. 553; James v. O'Driscoll, 3 Bay. 101; 1 Am. Dec. 632; Lange v. Kaiser, 34 Mich. 317.

³ Lawson Rights, Rem. & Pr., § 247; Kennard v. Whitson, 1 Houst. 36; Dawson v. Dawson, 13 N. J. (Eq.) 246; Lee v. Lee, 4 G. & J. 316; Little v. Dawson, 4 Dall.

111; Martin v. Wright, 13 Wend. 460; 28 Am. Dec. 468.

⁴ Lawson Rights, Rem. & Pr., § 247; Martin v. Wright, *supra*; Parsell v. Styker, 41 N. Y. 480; Reynolds v. Robinson, 64 N. Y. 583; Shakespeare v. Markham, 10 Hun, 311; Egan v. Kerrigill, 1 Dem. 464; Frost v. Tarr, 53 Ind. 394; Taylor v. Wood, 4 Lea, 504.

⁵ Lawson Presumptive Ev. Rule 86 and cases there cited.

⁶ Turner v. Jones, 1 Lans. 147.

⁷ Bishop Contr., § 184. "The law when it has imposed a duty on the objecting party promises in his stead." Earle v. Coburn, 130 Mass. 596.

deserts his wife and forbids all persons to trust her on his account, saying that he will not be liable for her debts; nevertheless the law basing its action on the duty of the husband to support his wife creates a promise to pay for all necessities supplied to her.¹

Illustrations of the principle that where the law creates a duty, it creates also a promise to the person on whom it is imposed to perform that duty, are to be found in every branch of the law. Thus a common carrier intrusted with goods impliedly promises to carry and deliver them safely with certain legal exceptions,² and the same is true of an inn-keeper;³ a person using a toll-gate promises to pay the statutory toll, even though there is a penalty for evading the toll;⁴ taxes may be collected by suit on an implied promise to pay the collector;⁵ towns under a statutory obligation to support their paupers are liable on an implied promise to re-imburse other towns and individuals who have furnished such relief.⁶

A promise will not be implied where there is an express contract covering the subject-matter.⁷ Yet where an express promise (not under seal) contains nothing more than the law will imply, the action may be brought on the implied promise.⁸ So where both parties have departed from the express contract, an action may be sustained on the implied promise.⁹ Thus where goods are delivered and

¹ *Metc. Contr.* 10; see *post*, §160..

² *Lawson R., R. & Pr. & Title XXI*

³ *Id.*

⁴ *Central Bridge v. Abbott*, 4 Oush. 478; *New Albany Plank Road v. Lewis*, 49 Ind. 161.

⁵ *Metc. Contr.* 6.

⁶ *Metc. Contr.* 6.

⁷ *Phelps v. Sheldon*, 13 Pick. 50; 23 Am. Dec. 639; *King v. Woodruff*, 23 Conn. 56; 60 Am. Dec. 625; *North v. Nichols*, 37 Conn. 375; *Walker v. Brown*, 28 Ill. 378; 81 Am. Dec. 287; *Eggleston v. Buck*, 24 Ill. 362; *Massachusetts General Hospital v. Fairbanks*, 129 Mass. 78; 37 Am. Rep. 303; *Brown v. Fales*, 139 Mass.

21; *Whitney v. Sullivan*, 7 Mass. 107; *Draper v. Randolph*, 4 Harr. (Del.) 454; *Dermott v. Jones*, 2 Wall. 1; *Western v. Sharp*, 14 B. Mon. 177; *Brown v. Perry*, 14 Ind. 32; *Chandler v. State*, 5 H. & J. 284; *Voorhees v. Combs*, 33 N. J. (L.), 494.

⁸ *Metc. Contr.* 8; *Gordan v. Martin*, Fitz. 303; *Gibbs v. Bryant*, 1 Pick. 118; *Princeton Tp. Co. v. Gulich*, 16 N. J. (L.) 161; *Gray v. Gower*, 2 Marsh. 275; *Cornwall v. Guild*, 4 Pick. 444; *Bank v. Patterson*, 7 Oranch. 299; *Maynard v. Tidball*, 2 Wis. 34.

⁹ *Metc. Contr.* 8; *Goodrich v. Ladin*, 1 Pick. 57.

accepted in pursuance of an express contract, but not in complete performance thereof, a recovery is allowed, based not on the contract, but on an *implied assumpsit* arising from the benefit which defendant has received from the appropriation of the property of the plaintiff. The limit of recovery in such case is the true value of the property not exceeding the contract price.¹ A contract will not be implied where an express contract would for any reason be invalid.²

§ 41. **Void or Voidable Express Contract.** — Where an express contract is void because illegal, a person who relying upon it has furnished some lawful thing to the other may recover pay for it on a contract which the law will create, although he could not sue on the contract itself.³ So an infant's express contract being voidable by him he cannot bind himself by a contract even for necessities, yet the party supplying them may recover on a contract created by the law to pay the reasonable value of necessities supplied to the infant.⁴ And where services have been performed by him in partial or entire execution of an express contract, and he avoids it as he has a right to do, he may recover on an implied promise the value of such services.⁵

§ 42. **Infants and Insane Persons.** — Neither an infant nor an insane person can make a binding contract, and yet if either obtains "necessaries" from another, the law creates a contract binding on him to pay the price.⁶ Nor

¹ *Chapman v. Dease*, 34 Mich. 375; *Starr Glass Co. v. Morey*, 108 Mass. 574; *Goodwin v. Merrill*, 13 Wis. 358; *Dermott v. Jones*, 23 How. 220; *Richards v. Shaw*, 67 Ill. 222; *Larkin v. Mitchell*, 42 Mich. 206; *Hart v. Mills*, 15 M. & W. 57.

² *Chase v. R. R. Co.*, 97 N. Y. 384; 49 Am. Rep. 531.

³ *Bishop Contr.*, § 188; *Thornton v. Percival*, 1 Pick. 415.

⁴ *Metc. Contr.* 86; *Stone v. Dennison*,

13 Pick. 6; *Earle v. Reed*, 10 Metc. 387; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Hyer v. Hyatt*, 3 Cranch, C. C. 276; *Parsons v. Keys*, 43 Tex. 557.

⁵ *Gaffney v. Hayden*, 110 Mass. 137; *Vehue v. Pinkham*, 60 Me. 142; *Derocher v. Continental Mills*, 58 Me. 217; *Ray v. Haines*, 52 Ill. 435; *Whitmarsh v. Hall* 3 Denio, 375.

⁶ See *post*, Chap. V; *Parties*.

can an infant agree to pay the debts of another, yet if he marries a woman owing debts the law creates a contract on his part to pay them.¹

§ 43. **Contract Created from a Tort.**—There are cases where a *tort* may be waived by the party injured, who may treat it as a breach of an implied contract.² Thus where by a wrongful act a person has obtained possession of one's property or money, the other may sue him on an implied promise to restore it.³ This right in some States is denied where property *has been taken but not sold*, or otherwise disposed of by the taker, the courts saying that there the fiction of the receipt by the defendant of money which he is bound in good conscience to pay back and which therefore he is implied to promise to pay back, cannot be indulged in.⁴ But the great weight of authority is in favor of the right to waive the tort and sue on the implied contract even in such a case.⁵

§ 44. **Money Obtained by Wrongful Act.**—Where one has wrongfully or fraudulently possessed himself of money

¹ See *post*, § 135.

² Hall v. Peckham, 8 R. I. 93.

³ Cooley on Torts, 93; among other cases Shaw v. Coffin, 58 Me. 254; 4 Am. Rep. 290; Gilmore v. Wilbur, 12 Pick. 120; 22 Am. Dec. 410.

⁴ Cooley Torts, 94; citing Barlow v. Stalworth, 27 Ga. 517; Pike v. Bright, 29 Ala. 333; Emerson v. McNamara, 41 Me. 565; Noyes v. Loring, 55 Me. 408; Jones v. Hoar, 5 Pick. 285; Glass Co. v. Wolcott, 2 Allen, 227; Mann v. Locke, 11 N. H. 246; Smith v. Smith, 43 N. H. 536; Morrison v. Rogers, 3 Ill. 317; O'Reer v. Strong, 13 Ill. 688; Kelty v. Owens, 4 Chand. 166; Elliott v. Jackson, 3 Wis. 649; Stearns v. Dillingham, 23 Vt. 624; 54 Am. Dec. 88; Willett v. Willett, 3 Watts. 277; Pearsoll v. Chapin, 44 Pa. St. 9; Guthrie v. Wickliffe, 1 A. K. Marsh, 83; Fuller v. Duren, 36 Ala. 73; 76 Am. Dec. 318; Tucker v. Jewett, 32 Conn. 563;

Sanders v. Hamilton, 3 Dana, 550; Ryers v. Greenbush, 57 Me. 441.

⁵ Terry v. Munger, 121 N. Y. 161; 18 Am. St. Rep. 303; Halleck v. Mixer, 16 Cal. 574; Cooper v. Berry, 31 Ga. 576; Randolph Iron Co. v. Elliott, 34 N. J. L. 184; Noyes v. Loring, 55 Me. 408; Watson v. Stever, 25 Mich. 386; Moses v. Arnold, 43 Iowa, 187; Miller v. Miller, 7 Pick. 133; 19 Am. Dec. 284; Budd v. Hiller, 27 N. J. L. 43; Stockette v. Watkin's Admr., 2 Gill. & J. 328; Welch v. Bagg, 12 Mich. 42; Hill v. Davis, 3 N. H. 384; Floyd v. Wiley, 1 Mo. 430; Ford v. Caldwell, 3 Hill (S. C.) 248; Baker v. Corey, 15 Ohio, 9; Fiquet v. Allison, 12 Mich. 328; 86 Am. Dec. 54; Webster v. Drinkwater, 5 Me. 319; 17 Am. Dec. 238; Jones v. Buzzard, 1 Hemp. 240; Johnson v. Reed, 8 Ark. 202; Labeaume v. Hill, 1 Mo. 643; Putnam v. Wise, 1 Hill, 240; 37 Am. Dec. 309; Schweizer v. Weiber, 6 Rich. 159; Hudson v. Gilliland, 25 Ark. 180.

or of goods which he has turned into money, the rightful owner, though he has a remedy by an action of trespass or trover or for damages suffered by him through the fraud, may waive these and sue for the debt on the promise which the law implies.¹

§ 45. Money Paid Under Compulsion or Duress. — On this principle money paid under duress of the person, or imprisonment, or by threats of imprisonment,² or of personal injury,³ or money paid to obtain possession of goods⁴ wrongfully taken or detained,⁵ or to protect property from threatened injury, may be recovered back.⁶ But there must be some actual or threatened exercise of power possessed,

¹ *Benton v. Driggs*, 30 Wall. 125; *Gibson v. Stevens*, 3 McLean, 531; *Reynolds v. Rochester*, 4 Ind. 43; *McDonald v. Brown*, 62 Ill. 32; *Walter v. Coleman*, 81 Ill. 380; 25 Am. Rep. 236; *Magoffin v. Muldrow*, 12 Mo. 512; *Barnard v. Colwell*, 39 Mich. 215; *McConnell v. Ins. Co.*, 18 Ill. 226; *Johnson v. Ins. Co.*, 39 Mich. 33; *Merriam v. Wolcott*, 3 Allen, 258; 80 Am. Dec. 69; *Western Ins. Co. v. Towle*, 65 Wis. 247; *Jones v. Innes*, 32 Kas. 17.

² *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Eddy v. Henin*, 17 Me. 338; 35 Am. Dec. 261; *Sartwell v. Horton*, 28 Vt. 370. The imprisonment must be unlawful. *Eddy v. Henin*, *Id.*

³ *Richardson v. Duncan*, 3 N. H. 508; *Harvey v. Boyd*, 42 Ill. 336. A menace of personal injury is not duress unless it threatens serious bodily harm sufficient to overcome the will of a person of ordinary firmness. *Harmon v. Harmon*, *supra*.

⁴ It is generally held (though there are cases *contra*) that the rule is different as to money paid to prevent the sale or seizure of real property. *Lawson lights. Rem. & Pr.*, § 2357. In *Stover v. Mitchell*, 45 Ill. 213, it is said: "It has been sometimes held that a seizure of goods amounts to duress, because the owner may have such a pressing necessity for their immediate use that his legal remedies would not sufficiently protect him. * * * But we can discover no

duress or compulsion where an execution against A is levied on the land of B. The latter is not disturbed in his person, or the possession or enjoyment of his property. If confident of his title, he need give himself no trouble. If the superiority of his title to the lien of the judgment is questionable, or depends on matters *in pais*, resting in parol proof, and he fears a sale may create a cloud upon his title, he can stay the sale by injunction. If, instead of this, he prefers to buy his peace, he cannot subsequently say he acted under compulsion, and call on the courts to give him back his money."

⁵ *Fleetwood v. New York*, 2 Sand. 479; *Scholey v. Mumford*, 60 N. Y. 501; *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 237; *Peyser v. Mayor*, 70 N. Y. 501; 26 Am. Rep. 624; *Commercial Bank v. Rochester*, 41 Barb. 342; *Baldwin v. Liverpool Co.*, 11 Hun, 325; *Dewey v. Supervisors*, 2 Hun, 336.

⁶ *Cobb v. Charter*, 32 Conn. 358; 87 Am. Dec. 178; *Emerson v. Lee*, 18 La. Ann. 184; 89 Am. Dec. 648; *Heckman v. Swartz*, 64 Wis. 48: "Such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust or oppressive." *Dickerman v. Lord*, 21 Iowa, 338; 89 Am. Dec. 579; *Mann v. Lewis*, 3 W. Va. 215; 100 Am. Dec. 747.

or supposed to be possessed, by the party exacting or receiving the payment¹ over the person or property of the party making the payment,² from which the latter has no other means³ of immediate relief⁴ than by advancing the money.⁵

For example, where one pays money to free his goods from an attachment levied on them by one who has no cause of action, but brings the proceeding to extort money,⁶ or where a common carrier or bailee of property refuses to carry or deliver property, except on payment of an excessive or illegal charge and it is paid under protest,⁷ or where a sheriff levies on property which does not belong to the judgment debtor, and the owner is compelled to pay the judgment to save his goods,⁸ or where a man pays an illegal tax or assessment under protest to save his property,⁹

¹ *Brumagim v. Tillinghast*, 18 Cal. 265; 79 Am. Dec. 176; *Taylor v. Board of Health*, 31 Pa. St. 73; 73 Am. Dec. 724; *Smith v. Schroeder*, 15 Minn. 25.

² *Robertson v. Marsh*, 42 Tex. 149; *Robinson v. Gould*, 11 Cush. 57; *after* when the party is a near relative; see *post*, Durces, §233..

³ Therefore the commencement of legal proceedings, without any seizure of property or person, is insufficient; for the party has an ample remedy in his right to set up his defense in the court. *Benson v. Monroe*, 7 Onah. 125; 54 Am. Dec. 716; *Dickerman v. Lord*, 21 Iowa, 338; 89 Am. Dec. 579; *Watson v. Cunningham*, 1 Blackf. 321; *Cummins v. White*, 4 Blackf. 356. So money wrongfully demanded as rent and paid under threats of ejectment is not recoverable. *Emmons v. Scudder*, 115 Mass. 367. And see *Nick v. Sherm*, 49 Ark. 70; 4 Am. W. Rep. 26.

⁴ *Cook v. Boston*, 9 Allen, 398; *Preston v. Boston*, 19 Pick. 7; *Harmon v. Harmon*, 61 Me. 237; 14 Am. Rep. 556; *Taylor v. Board of Health*, 31 Pa. St. 73; 72 Am. Dec. 724; *Fellows v. School Dist.*, 39 Me. 535; *Claffin v. McDonough*, 33 Mo. 412; *Mayor v. Lefferman*, 4 Gill, 425; 45 Am. Dec. 145; *Cunningham v. Boston*, 15 Gray, 468; *Schulz v. Culbertson*, 46 Wis. 313; 49 Wis. 132.

⁵ *Brumagim v. Tillinghast*, 18 Cal. 265;

79 Am. Dec. 176; *Garrison v. Tillinghast*, 18 Cal. 404; *Radick v. Hutchins*, 95 U. S. 210; *Elston v. Chicago*, 40 Ill. 514; 89 Am. Dec. 361; *Waubesaee Co. v. Walker*, 8 Kan. 431; *Mays v. Cincinnati*, 1 Ohio St. 260; *Ladd v. Southern Press Co.*, 53 Tex. 172; *Corkle v. Maxwell*, 3 Blatchf. 413; *Maxwell v. Griswold*, 10 How. 242; *Wolfe v. Marshall*, 52 Mo. 167.

⁶ *Chandler v. Sanger*, 114 Mass. 364; 19 Am. Rep. 367.

⁷ *Tutt v. Ide*, 3 Blatchf. 240; *Briggs v. Boyd*, 56 N. Y. 230; *Harmony v. Bingham*, 12 N. Y. 99; *Schorfe v. Halifax*, 7 Mees. & W. 238; *Chase v. Taylor*, 4 Har. & J. 54; *Chase v. Dwinall*, 7 Me. 134; 20 Am. Dec. 352; *Clinton v. Strong*, 9 Johns. 360; *Quinnett v. Washington*, 10 Mo. 54; *Lafayette, etc., R. R. Co. v. Putteson*, 41 Ind. 312; *Beckwith v. Frisbie*, 33 Vt. 559; *Mobile, etc., R. R. Co. v. Steiner*, 61 Ala. 559; *Chicago, etc., R. R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121; *Kenneth v. R. R. Co.*, 15 Rich. 284; 98 Am. Dec. 382.

⁸ *Adam v. Town of Litchfield*, 10 Conn. 127; *Preston v. Boston*, 12 Pick. 7; *Valpy v. Manning*, 1 Com. B. 598; *Snowdon v. Davis*, 1 Taunt. 359.

⁹ *Elliot v. Swartwout*, 10 Pet. 139; *Smith v. Redfield*, 27 Me. 145; *Stephan v. Daniels*, 27 Ohio St. 527; *Erskine v. Van Arsdale*, 15 Wall. 75; *Branam v. Mayor*, 24 Cal. 535; *Union Ins. Co. v. City of Alleghany*, 15 Pittsb. Rep. 321;

or where a public officer exacts fees to which he is not entitled before he will perform his legal duty,¹ or where an excessive water license fee is paid under threat of cutting the water off,² in all these cases on the implied promise to pay over the money thus wrongfully obtained, the plaintiff may recover it as for a debt due him. In *Dana v. Kemble*,³ an actor, after everything was ready for the performance, refused to perform until a certain sum of money, to which he was not entitled, was paid him. It was held that the payment was involuntary, and recoverable by the manager.

§ 46. Voluntary Payments. — A voluntary payment made without any circumstances of compulsion or extortion, or a payment made with knowledge of all the circumstances, in discharge of a claim which was not due, or which might have been successfully resisted, is not recoverable and it makes no difference whether or not the claim was made in an action or legal proceeding.⁴ Where a person pays a tax or assessment voluntarily, — not to save his goods from being sold, there being no seizure or proceeding to compel the payment, — he cannot recover it back on the ground

Peyser v. Mayor, 70 N. Y. 497; 28 Am. Rep. 624; *Wiley v. Farmer*, 14 Ala. 627; *Crutchfield v. Wood*, 16 Ala. 703; *Cababa v. Burnett*, 34 Ala. 400; *Hubbard v. Brainard*, 35 Conn. 563; *Lenman v. Des Moines*, 29 Iowa, 310; *De Fremey v. Austin*, 53 Cal. 380; *Hendy v. Soule*, *Deady*, 400; *Union R. R. Co. v. Skinner*, 9 Mo. App. 139; *County Comm'r. v. Parker*, 7 Minn. 287; *First Nat. Bank v. Blakely*, 40 Mich. 387; *Greenbaum v. King*, 4 Kan. 284; 96 Am. Dec. 173; *Tuttle v. Everett*, 51 Miss. 27; 24 Am. Rep. 622.

¹ *Clinton v. Strong*, 9 Johns. 370; *Townsend v. Dyckman*, 2 E. D. Smith, 224; *Am. Ex. Ins. Co. v. Britton*, 8 Bosw. 148; *Alston v. Durant*, 2 Strobb. 237; 49 Am. Dec. 596; *Walker v. Ham*, 2 N. H. 338; *Robinson v. Ezell*, 73 N. C. 231.

² *Westlake v. St. Louis*, 77 Mo. 47; 46 Am. Rep. 4.

³ 17 Pick. 545.

⁴ *Elliot v. Swartwout*, 10 Pet. 187; *Morris v. Tann*, 1 Dall. 147; 1 Am. Dec. 233; *Hall v. Schulz*, 4 Johns. 240; 4 Am. Dec. 370; *Gould v. McFall*, 118 Pa. St. 455; 4 Am. St. Rep. 608; *Taylor v. Bd. of Health*, 31 Pa. St. 73; 72 Am. Dec. 724; *Smith v. Redfield*, 27 Me. 145; *Balt. etc., R. Co. v. Farnce*, 6 Gill, 68; 46 Am. Dec. 683; *Mayor v. Hughes*, 1 Gill & J. 480; 19 Am. Dec. 243; *Dickeman v. Lord*, 21 Id. 338; 89 Am. Dec. 579; *Pettis v. Ray*, 13 R. I. 344; *Brumagim v. Tillinghast*, 18 Cal. 263; 79 Am. Dec. 178; *Knox Co. Bk. v. Doty*, 9 Ohio St. 506; 75 Am. Dec. 479; *Dickson v. Jones*, 6 Yerg. 483; 27 Am. Dec. 488; *Hubbard v. Martin*, 8 Yerg. 500; *Beecher v. Buckingham*, 18 Conn. 110; 44 Am. Dec. 580; *Stevens v. Heard*, 9 Vt. 174; 31 Am. Dec. 617; *Potomac Coal Co. v. R. R. Co.*, 38 Md. 226; *Beecher v. Buckingham*, 18 Conn. 110; 44 Am. Dec. 580.

that the tax or assessment was illegal.¹ So payment of a license fee to engage in a particular business is voluntary, and cannot be recovered, though illegal, where the effect of not paying would be a prosecution, either criminal or civil, in which the party could contest its legality.²

§ 47. **Legal Process.**—Money paid under compulsion of legal process cannot be recovered back, though the money may not have been justly due, or the process may have been irregularly or wrongfully issued. The judgment of the court is conclusive and cannot be questioned in a new action.³ But a recovery may be had where the judgment is afterwards reversed⁴ or the seizure is not authorized by the process⁵ or the court rendering the judgment had no jurisdiction to do so.⁶

§ 48. **Effect of Protest.**—A voluntary payment does not become an involuntary one merely because it is made under protest.⁷ Where a statute requires a protest no

¹ *Union Pac. R. R. Co v. Comm'rs*, 98 U. S. 541; *Town of Ligonier v. Ackerman*, 46 Ind. 552; 15 Am. Rep. 323; *Morris v. Mayor*, 5 Gill, 248; *Wills v. Austin*, 53 Cal. 152; *Goddard v. Seymour*, 30 Conn. 394; *Garrigan v. Knight*, 47 Iowa, 525; *Christy v. St. Louis*, 20 Mo. 143; 61 Am. Dec. 598; *Clafin v. McDonough*, 83 Mo. 412; 84 Am. Dec. 54.

² *Ligonier v. Ackerman*, 46 Ind. 552; 15 Am. Rep. 323; *Mays v. Cincinnati*, 1 Ohio St. 268; *Sullivan v. McCammon*, 51 Ind. 264; *Edinburg v. Hackney*, 54 Ind. 83; *Cahaba v. Burnett*, 84 Ala. 400; *Garrison v. Tillinghast*, 18 Cal. 408; *Clafin v. McDonough*, 83 Mo. 412; 84 Am. Dec. 54; *Irving v. St. Louis Co.*, 33 Mo. 575; *Robinson v. Charleston*, 2 Rich. 317; 45 Am. Dec. 739; *Corkle v. Maxwell*, 3 Blatchf. 413; *Benson v. Monroe*, 7 Cush. 125; 54 Am. Dec. 716; *O'Brien v. Colusa Co.*, 67 Cal. 503; *Cook v. Boston*, 9 Allen, 393; *Lee v. Templeton*, 13 Gray, 478; *Emery v. Lowell*, 127 Mass. 138; *Noyes v. State*, 46 Wis. 250; 32 Am. Rep. 710.

³ *Marriott v. Hampton*, 7 Term Rep. 269; 3 Smith's Lead. Cas. 356; *Gray v. Roberts*, 2 A. K. Marsh. 208; 13 Am. Dec. 383; *Kirklan v. Brown*, 4 Humph. 174; 40 Am. Dec. 635; *Stevens v. Howe*, 127 Mass. 164; *Le Grand v. Francisco*, 8 Munf. 83; *Tilton v. Gordon*, 1 N. H. 33; *Corbet v. Evans*, 25 Pa. St. 310; *James v. Cavit*, 2 Brev. 174; *Federal Ins. Co. v. Robinson*, 82 Pa. St. 357; *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333; *Gordon v. Mayor*, 5 Gill, 231; *Brangdon v. Somerby*, 55 Me. 92; *Kobler v. Wells*, 26 Cal. 606; *Supervisors v. Briggs*, 3 Denio, 26.

⁴ *Baun v. Reynolds*, 18 Cal. 275; *Mayor v. Ricker*, 38 N. J. (L.) 225; 20 Am. Rep. 386; *Metzner v. Bauer*, 98 Ind. 425; *Travelers Ins. Co. v. Heath*, 95 Pa. St. 333; *Scholey v. Halsey*, 72 N. Y. 578.

⁵ *Logan v. Semter*, 28 Ga. 242; 73 Am. Dec. 755.

⁶ *Gordon v. Mayor*, 5 Gill, 231.

⁷ *Regan v. Baldwin*, 126 Mass. 485; 30 Am. Rep. 689; *Fleetwood v. New York*, 2 Sand. 475; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Brumagim v. Tillinghast*, 18 Cal. 265; 79 Am. Dec.

recovery can be had without one,¹ and if a written protest is required an oral one is of no effect.² And it has been ruled in some cases that an illegal tax can in no case be recovered if its payment was unaccompanied by a protest.³ And a protest made after payment is unavailing.⁴

§ 49. **Money Equitably Belonging to Another.**—Where one person has obtained money of another which he has not a right equitably to retain or withhold, as where money has been paid by accident, mistake of fact, duress or fraud, the law creates a promise on his part to pay it over to the rightful owner.⁵

§ 50. **Failure of Consideration.**—Where money has been paid for a consideration which entirely⁶ fails the payor may recover it back on an implied contract to repay it,⁷ as for example where one pays for goods which the seller fails to deliver,⁸ or pays money on a contract to convey a piece of land and it turns out that the vendor has no title to convey.⁹ But where one has obtained the thing he paid for, he cannot recover back the purchase price merely because it was at the time or has become of no value.¹⁰

176; *Flower v. Lance*, 59 N. Y. 608; *Trinity Church v. Mayor*, 10 How. Pr. 128; *Forrest v. Mayor*, 13 Abb. Pr. 350; *Benson v. Monroe*, 7 Cush. 125; 54 Am. Dec. 716; *Ladd v. Southern Cotton Press Co.*, 53 Tex. 172; *Marietta v. Slocumb*, 6 Ohio St. 471; *Patterson v. Cox*, 25 Ind. 261; *Awelt v. Eulaw, etc., Ass'n*, 34 Md. 435; *Wauhansee Co. v. Walker*, 8 Kan. 431; *Kansas, etc., R. R. Co. v. Wyandotte Co.*, 16 Kan. 587; *Detroit v. Martin*, 34 Mich. 170; 22 Am. Rep. 512; *Shane v. St. Paul*, 26 Minn. 543.

¹ *U. S. v. Clement, Crabbe*, 447; *Schlesseger v. U. S.*, 1 Ct. of Cl. 16.

² *Knowles v. Boston*, 129 Mass. 551;

³ *Allentown v. Saeger*, 20 Pa. St. 421; *McCrickart v. Pittsburg*, 88 Pa. St. 133; *Jackson v. Atlanta*, 61 Ga. 223.

⁴ *Marriott v. Brune*, 9 How. 619.

⁵ *Lawson Rights, Rem. & Pr.*, § 2552, 2014; *Peterson v. Foss*, 12 Oregon, 81; *Gorman v. Carroll*, 7 Allen, 199; *Hunsdale v. White*, 34 Vt. 583; *Allen v. Burlington*, 45 Vt. 202; *McDonald v. Peacemaker*, 5 W. Va. 439; *Gordon v. Bruner*, 49 Mo. 570; *Pheteplice v. Eastman*, 26 Ia. 446; *Swatara R. Co. v. Brune*, 6 Gill, 41; *Jamison v. Moore*, 43 Miss. 598; *Hagaman v. Neitzel*, 15 Kan. 383.

⁶ *Leake Contr.* 111.

⁷ *Chapman v. Brooklyn*, 40 N. Y. 380; *Johnson v. Jennings*, 10 Gratt. 1; 80 Am. Dec. 323.

⁸ *Devaux v. Connelly*, 8 C. B. 640.

⁹ *Pipkin v. James*, 1 Humph. 323; 34 Am. Dec. 652.

¹⁰ *Schwazzenbach v. Odorless, etc., Co.*, 65 Md. 34; 57 Am. Rep. 301.

§ 51. Money Paid for Use of Another. — Where one person pays money for another under circumstances which make it right and just that it should be repaid, the law implies a contract on the part of the person benefited to repay it, without any actual agreement on his part.¹ Therefore when a person has been compelled by law to pay money which another was liable to pay and the latter has obtained the benefit of the payment he may be compelled to repay the sum.² But the payment must operate in discharge of some liability on his part, the discharge of a mere moral obligation or one not recognized in law or in equity will not create a liability to repay.³ And the law does not imply any promise to repay one who voluntarily pays another's debt, for one is not allowed to make himself the creditor of another by paying his debt against his will or without his consent.⁴ If a person to preserve his own property is required to pay another's debt the latter becomes liable to repay him,⁵ as where one having purchased a chattel discovers a lien upon it given by the seller, and pays it to get a clear title,⁶ or one purchases goods which turn out to have been imported in violation of the revenue laws, and pays the penalty to avoid their forfeiture,⁷ in both these cases the law creates a promise on the part of the seller to re-imburse the purchaser. So a surety discharging his principal's debt has an action against the principal, though the latter has made no express promise to repay.⁸

¹ Lawson Rights, Rem. & Pr., § 2549; Lewis v. Campbell, 8 C. B. 545.

² Ralston v. Wood, 15 Ill. 159; 58 Am. Dec. 604.

³ Lawson Rights, Rem. & Pr., § 2550.

⁴ Johnson v. Packet Co., L. R. 3 C. P. 48; Winsor v. Savage, 9 Metc. 346; South Scituate v. Hanover, 9 Gray. 420; Bancroft v. Abbott, 3 Allen, 524; Jones v. Wilson, 3 Johns. 434; Menderbach v. Hopkins, 8 Johns. 436; Beach v. Vanderburgh, 10 Johns. 361; Blanchard v. First Association, 59 Me. 203; Richardson v. Williamson, 49 Me. 553; Junkins v. Union School

Dist., 89 Me. 220; Little v. Gibbs, 4 N. J. (L.) 211; Woodford v. Leavenworth, 14 Ind. 311; Oden v. Elliott, 10 B. Mon. 313; Lewis v. Lewis, 3 Strobb. 530.

⁵ Exall v. Partridge, 8 T. R. 308; Cole v. Malcolm, 66 N. Y. 363.

⁶ Alford v. Cobb, 28 Hun, 22.

⁷ Summers v. Clark, 29 La. Ann. 93.

⁸ Kimble v. Cummins, 3 Met. (Ky.) 327; Clay v. Severance, 55 Vt. 300; Hasinger v. Solms, 5 S. & R. 4; Gibbs v. Bryant, 1 Pick. 118; Appleton v. Bascom, 3 Metc. 169; Powell v. Smith, 8 Johns. 249; Ward v. Henry, 5 Conn. 595.

and likewise where one of two sureties pays the whole or more than his share.¹

§ 52. **Payment under Mistake of Fact.** — Money paid under a mistake of fact may be recovered back, where the mistake is such as to have produced a supposed liability to pay the money, which in reality did not exist.² A mistake of fact occurs where some fact which really exists is unknown to the party, or some fact is believed by him to exist which really does not.³ But it can never be said that money is paid by mistake and therefore recoverable where the payment has been made in discharge of clearly ascertained legal rights and duties;⁴ or where it is paid in the reasonable belief that it is due, and after investigation, or the opportunity therefor, and without fraud on the part of the recipient.⁵

In *Wheadon v. Olds*,⁶ W bought from O and paid for a lot of wheat, the quantity being estimated by the size of another lot which both supposed to contain a certain number of bushels, but which subsequently was discovered to contain only that number of half bushels, and it was held that W was entitled to recover the excess payment.

§ 53. **Payment Under Mistake of Law.** — But where money is paid voluntarily with knowledge of all the facts, the party cannot recover it back on the ground that he made a mistake as to his legal liability, or was ignorant of

¹ *Russell v. Feller*, 1 Ohio St. 327; 50 Am. Dec. 327; *Moore v. Moore*, 4 Hawks, 338; 15 Am. Dec. 523; *White v. Banks*, 21 Ala. 705; 58 Am. Dec. 283.

² *Worley v. Moore*, 97 Ind. 15, *Kings-ton Bank v. Eltinge*, 40 N. Y. 391; 100 Am. Dec. 516; *Lyle v. Shinnabarger*, 17 Mo. App. 66; *Garland v. Salem Bank*, 9 Mass. 406; 6 Am. Dec. 8; *Walte v. Leggett*, 8 Cow 195; 18 Am. Dec. 441; *Lake v. Artisans' Bank*, 3 Keyes. 378; *Feemster v. Markham*, 2 J. J. Marsh. 303; 19 Am. Dec. 131; *Dichins v. Jones*, 6 Yerg. 483;

27 Am. Dec. 488; *Frazier v. Tubbs*, 2 Helsk. 667; *Frontier Bank v. Morse*, 22 Me. 88; 38 Am. Dec. 284; *Baltimore, etc., R. R. Co. v. Faunce*, 6 Gill, 68; 46 Am. Dec. 655; *Appleton Bank v. McGilvray*, 4 Gray, 518; 64 Am. Dec. 92.

³ *Mowatt v. Wright*, 1 Wend. 335; 19 Am. Dec. 509. See post, § 206; MISTAKE.

⁴ *Hagerstown Bk. v. Adams Ex. Co.*, 45 Pa. St. 419; 84 Am. Dec. 499.

⁵ *Wheeler v. Hathaway*, 58 Mich. 77.

⁶ 20 Wend. 175.

the law of the case.¹ A mistake of law is where a party knows the facts of the case, but is ignorant of the legal consequences.²

§ 54. **Money Paid for Illegal Purpose.** — It is a well-known principle of law that the court will (subject to some exceptions) neither enforce nor set aside an illegal contract, but will, as it is said, leave the parties where they have put themselves and where it finds them, according to the maxim *in pari delicto potior est conditio defendentis*. Therefore, money paid,³ or goods delivered,⁴ or land conveyed⁵ under an illegal contract, whether as the consideration or in performance of the contract, cannot be recovered back.⁶ A person for example who has lost money at play or on a bet or wager cannot after it has been paid over to the winner recover it back from him.⁷

But to this rule there are three exceptions, viz.: (a) Where the parties are not equally guilty; (b) where the party complaining is protected by the law; (c) where the illegal agreement has not been executed.

¹ Beard v. Beard, 25 W. Va. 486; 52 Am. Rep. 219; Kenney v. Dodge, 101 Ind. 573; Rector v. Collins, 46 Ark. 167; 55 Am. Rep. 571; Churchill v. Bradley, 58 Vt. 403; 56 Am. Rep. 563; Lester v. Mayor of Baltimore, 29 Md. 415; 96 Am. Dec. 542; Town v. Burnett, 34 Ala. 400; Branham v. Mayor of San Jose, 24 Cal. 535; Bucknall v. Story, 46 Cal. 589; 13 Am. Rep. 220; Sprague v. Birdsall, 2 Cow. 419; Clarke v. Dutcher, 9 Cow. 694; Mut. Law Inst. v. Enstein, 46 Mo. 200; Benson v. Monroe, 7 Cush. 125; 54 Am. Dec. 716; Supervisors v. Briggs, 2 Denio, 26; Downs v. Donnelly, 5 Ind. 496; Silliman v. Wing, 7 Hill, 159; Jenks v. Lima, 17 Ind. 326; Rheel v. Hicks, 25 N. Y. 291; Granger v. Olcott, 1 Lans. 171; Goddard v. Bank, 2 Sandf. 253; Wheaton v. Olds, 20 Wend. 176; Champlin v. Laytin, 18 Wend. 407; 31 Am. Dec. 382; Hemphill v. Moody, 64 Ala. 468.

² Mowatt v. Wright, 1 Wend. 355; 19 Am. Dec. 509.

³ Newstead v. Hall, 58 Ill. 172.

⁴ Myers v. Meinrath, 101 Mass. 386.

⁵ St. Louis, etc., R. Co. v. Mathers, 71 Ill. 592; 104 Ill. 257.

⁶ Worcester v. Eaton, 11 Mass. 386; Staples v. Gould, 5 Sandf. 416; Walt v. Menell, 4 Me. 102; 16 Am. Dec. 238; Boutelle v. Melendy, 19 N. H. 196; 49 Am. Dec. 153; Wayman v. Fiske, 3 Allen, 238; 80 Am. Dec. 66; Loomess v. Hesing, 44 Ill. 113; 92 Am. Dec. 153; Atwood v. Fish, 101 Mass. 363; 100 Am. Dec. 124.

⁷ Allen v. Dodd, 4 Humph. 181; 40 Am. Dec. 633; Hochaday v. Willis, 1 Spear, 379; 40 Am. Dec. 606; Webb v. Fulchire, 3 Ired. 435; 40 Am. Dec. 419; Guthman v. Parker, 3 Head. 234; Downs v. Quarles, Litt. Sel. Cas. 439; 12 Am. Dec. 33; Adams v. Barrett, 5 Ga. 404; Welsh v. Cutler, 44 N. H. 561; Meech v. Stoner, 19 N. Y. 26; Hudspeth v. Wilson, 2 Dev. 372; 21 Am. Dec. 344; McCullam v. Gourlay, 8 Johns. 147; Thrift v. Redman, 13 Iowa, 25; Danforth v. Evans, 16 Vt. 548; Tindall v. Childress, 2 Stew. & P. 250; Babcock v. Thompson, 3 Pick. 446; 15 Am. Dec. 235; Gill v. Webb, 4 T. B. Mon. 299.

(a) Though the object is illegal yet if the parties did not stand on an equal footing, and one of them has been induced to enter into the illegal agreement through fraud, oppression or undue influence, he is not prevented from appealing to the court for relief. He is *in delicto* but not *in pari delicto*. His guilt is less than that of his associate in the offense and the latter cannot make use of his peculiar power over the other under such circumstances to procure an illegal agreement, and then invoke the aid of the law to enable him to retain that which he has thus wrongfully obtained.¹ In *Atkinson v. Denby*,² the plaintiff, a debtor, offered his creditors a composition of 5s. in the pound. The defendant was one of the creditors, and his acceptance or rejection of the offer was known to be certain to determine the decision of several other creditors. He refused to assent to the composition unless the plaintiff would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and the plaintiff sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover, the court saying: "It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors; but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit."

(b) Statutes exist in some States expressly permitting the recovery of money lost at gaming,³ and in such cases

¹ Benj. Princ. of Contr. § 99; *Center v. Leavett*, 15 N. Y. 9; *Tracy v. Tallmage*, 14 N. Y. 228; *Richardson v. Crumbull*, 48 N. Y. 367; *Knowlton v. Congress, etc., Co.*, 57 N. Y. 532; *Bachr v. Wolf*, 59 Ill. 470; *Barnes v. Brown*, 33 Mich. 146; *Belding v. Smythe*, 138 Mass. 330; *Worcester v. Eaton*, 11 Mass. 368; *White v. Franklin Bk.*, 22 Pick. 181; *Brooks v. Martin*, 2 Wall. 81; *McBlair v.*

Gibbes, 17 How. 237; *Davidson v. Carter*, 56 Ia. 117.

² 6 H. & N. 778.

³ Thus in Illinois R. S. Ch. 38, § 132 and Missouri R. S. 1889, § 5209 among others and see *Tatman v. Strader*, 23 Ill. 493; *Richardson v. Kelly*, 65 Ill. 491; *Storey v. Brennan*, 15 N. Y. 524; 69 Am. Dec. 627.

the illegal nature of the transaction is no defense. And where the intent of the law violated was to protect one of the parties against the act of the other, they are not *in pari delicto* and the party intended to be protected may recover money paid by him in violation of such law.¹ For instance, by the statutes of usury, taking more than a certain interest is declared illegal and the contract void; but as these statutes were made to protect needy persons from the oppression of usurers, the party actually doing what the law prohibits, viz.: paying usury, may bring an action for the excess of legal interest.² So lotteries being forbidden by law, a person who pays money for a lottery ticket may nevertheless recover it back.³ So a party, who had deposited money in a bank repayable at a future day, in violation of a statute, was allowed to recover back the deposit, for to have decided otherwise would have given effect to an illegal contract in favor of the principal offender, and would have operated

¹ Lawson Rights, Rem. & Pr., § 2568.

² Browning v. Morris, 2 Cowp. 792; Schroepel v. Corning, 5 Denio, 236. Interest paid beyond the legal rate may be recovered back in some States. Albany v. Abbott, 61 N. H. 313; Wheaton v. Hubbard, 20 Johns. 290; 11 Am. Dec. 234; Philanthropic Bldg. Ass'n v. McKnight, 35 Pa. St. 470; Nat. Bank v. Lewis, 81 N. Y. 15; Grow v. Albee, 19 Vt. 540; Ware v. Bennett, 18 Tex. 794; Hodge v. Owings, 5 T. B. Mon. 94; Webb v. Wilshire, 20 Me. 406; West v. Meddock, 18 Ohio St. 417; Coughman v. Drafts, 1 Rich. Eq. 414; Zeigler v. Scott, 10 Ga. 389; 54 Am. Dec. 395; Wood v. Kenney, 19 Ind. 68; Willie v. Green, 2 N. H. 333; Bond v. Jones, 8 Smedes & M. 368; Fay v. Lovejoy, 20 Wis. 403; Heirck v. Dean, 54 Vt. 568; Musselman v. McElhenney, 23 Ind. 4; 85 Am. Dec. 445. While in others such an action cannot be maintained. Latham v. Building Ass'n, 77 N. C. 125; Woolfolk v. Bird, 22 Minn. 341; Quinn v. Boynton, 40 Iowa, 304; Hadden v. Inness, 24 Ill. 381; Perkins v. Conant, 29 Ill. 184; 81 Am. Dec. 305; Rutherford v.

Williams, 42 Mo. 18; Manny v. Stockton, 34 Ill. 306; Carter v. Moses, 39 Ill. 539; Nichols v. Skeel, 12 Iowa, 300; Spurlin v. Miliken, 16 La. Ann. 217; Dickerson v. Raleigh Building Ass'n, 89 N. C. 37. But even in the latter States the payment must have been voluntary to estop the borrower, and therefore where the usurious interest had been paid to a *bona fide* indorsee of the note, it was held that the maker might recover it from the payee, this being an involuntary payment, as the maker could not set up the defense of usury against a *bona fide* indorsee before maturity. Woodworth v. Houston, 40 Ill. 131; 89 Am. Dec. 340. In some of the States such actions are given by statute; but it is also held that these statutes are cumulative, and that the right to recover back usurious interest is a common-law right. Palmer v. Lord, 6 Johns. Ch. 65; Porter v. Mount, 41 Barb. 561.

³ Gray v. Roberts, 2 A. K. Marsh. 206; 2 Am. Dec. 383.

as a reward for an offense which the statute was intended to prevent.¹

(c) A person who has paid money or delivered goods for a purpose which is illegal may repudiate it at any time before that purpose is executed and recover them as for a failure of consideration.² A common illustration of this rule is where money is deposited with a stakeholder on a bet or game of chance. The depositor, although the whole transaction is illegal, may recover the money of the stakeholder if he demands it at any time before it is paid over to the winner.³ So if money has been paid to or deposited

¹ *Benj. Princ. of Contr.* 100; *White v. Franklin Bank*, 22 Pick. 181; *Atlas Bank v. Nahant Bank*, 3 Met. 581; *Tracy v. Talmage*, 14 N. Y. 162; *Parkersburg v. Brown*, 106 U. S. 487.

² *Spring Co. v. Knowlton*, 106 U. S. 49; *Knowlton v. Congress, etc., Co.*, 57 N. Y. 518; *Hooker v. De Palos*, 2 Conn. 369; *Wheeler v. Spencer*, 15 Conn. 26; *Skinner v. Henderson*, 10 Mo. 205; *Adams Ex. Co. v. Reno*, 48 Mo. 264; *Gowan v. Gowan*, 30 Mo. 472; *Bank v. Wallace*, 61 N. H. 24; *Hourse v. McKenney*, 46 Me. 94; *Shannon v. Baumer*, 10 Ia. 210; *Tyler v. Carlisle*, 79 Me. 210; 1 Am. St. Rep. 301.

³ *Hampden v. Walsh*, 1 Q. B. Div. 169; *Reynolds v. McKinney*, 4 Kan. 94; 80 Am. Dec. 602; *Hardy v. Hunt*, 11 Cal. 343; 70 Am. Dec. 787. But where the stakeholder pays over the money to the winner without any previous notice or demand by the loser, he is not liable, for the illegal agreement has thus become executed. *Perkins v. Eaton*, 5 N. H. 152; *McCullam v. Gourley*, 8 Johns. 147; *Gregory v. King*, 58 Ill. 169; 11 Am. Rep. 56; *Bates v. Lancaster*, 10 Humph. 134; 51 Am. Dec. 696. If the notice is given before the money is paid over, it is immaterial whether at the time of the notice the event upon which the money was staked has or has not happened. *Wheeler v. Spencer*, 15 Conn. 27; *Hale v. Sherwood*, 40 Conn. 332; 16 Am. Rep. 37; *Connor v. Ragland*, 15 B. Mon. 634; *Stacy v. Foss*, 19 Me. 335; 36 Am. Dec.

755; *Shannon v. Baumer*, 10 Iowa, 210; *Bledsoe v. Thompson*, 6 Rich. 44; 57 Am. Dec. 777; *Perkins v. Eaton*, 3 N. H. 152; *Moore v. Trippe*, 20 N. J. L. 263; *Ivery v. Phifer*, 11 Ala. 535; *Alford v. Burke*, 21 Ga. 46; 68 Am. Dec. 449; *Hampden v. Walsh*, L. R. I. Q. B. D. 192; *Garrison v. McGregor*, 51 Ill. 473; *Silgal v. Funk*, 3 Pittsb. Rep. 28; *Cleveland v. Wolff*, 7 Kan. 184; *Fisher v. Hildreth*, 117 Mass. 558; *Huncke v. Francis*, 27 N. J. L. 55; *Perkins v. Hyde*, 6 Yerg. 288; *Burroughs v. Hunt*, 18 Ind. 178; *Wilkinson v. Touseley*, 16 Minn. 299; 10 Am. Rep. 139; *Gillmore v. Woodcock*, 69 Me. 118; 31 Am. Rep. 255; *West v. Holmes*, 26 Vt. 534; *Shackelford v. Ward*, 3 Ala. 37; 36 Am. Dec. 435; *Jeffrey v. Ficklin*, 3 Ark. 227; 36 Am. Dec. 456; *McAllister v. Hoffman*, 16 Serg. & R. 147; 16 Am. Dec. 556. But in a few cases it has been ruled that no recovery can be had where the stakeholder is not notified before the happening of the event, though the money has not yet been paid to the winner. *Yates v. Foot*, 12 Johns. 1; *Johnston v. Russell*, 37 Cal. 670; *Hill v. Kidd*, 43 Cal. 615. This is the law in Missouri by statute R. S. 1839, § 5216. And if the other party has the money in his hands, the party rescinding the bet before the event happens may recover it from him. *Hickerson v. Benson*, 8 Mo. 8; 40 Am. Dec. 115; *Harper v. Cram*, 36 Ohio St. 238; 36 Am. Rep. 589; *McKee v. Maurice*, 11 Oush. 237.

with a third party to be disposed of under an illegal contract, or for an illegal purpose, it may be reclaimed at any time before it has been actually paid over under the authority given for its disposal.¹ So goods that have been delivered under an illegal agreement or for an illegal purpose, may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted.²

In *Spring Company v. Knowlton*,³ the officers of a corporation determined, in violation of a statute, to increase their capital stock, every old stockholder to have a full paid \$100 share for \$80, if he agreed that if the full amount of the new stock subscribed by him was not paid when called for, the amount that he had paid should be forfeited. K, an old stockholder, signed this agreement and took new stock, but after paying 20 per cent. of it he was unable to pay the balance and his stock was forfeited. Subsequently the corporation abandoned the scheme and refunded the money which had been paid for the new stock in cases where it had not been forfeited. K thereupon sued for the money which he had paid and which had been forfeited under the agreement, and it was held that he could recover.

The question as to the time when the agreement becomes executed and the party loses his right to relief was raised in a recent English case where A placed £1,000 to the account of a company to give it a fictitious credit in case of inquiries, the money to be returned to A at a specified date. Some of the money was drawn out with his authority, but after the date specified, and when the company had gone into liquidation, A demanded payment of the balance, on the ground that he had a right to revoke a fraudulent arrangement before it had been carried out. But the court held that "the object for which the advance was made was

¹ *Spring Co. v. Knowlton*, 108 U. S. 49 and cases cited *supra*; *Tyler v. Carlisle*, 79 Me. 210; 1 Am. St. Rep. 301; *Clarke v. Browne*, 77 Ga. 606; 4 Am. St. Rep. 98.

² *Taylor v. Bowers*, L. R. 1 Q. B. D. 291.

³ 103 U. S. 49.

attained; as the company continued to have fictitious credit till the commencement of the winding up and that it was too late for A to repudiate the bargain and claim the money.”¹

(c) *Contracts Implied from Express Ones.*

§ 55. *Introductory.* — Every contract will be construed by the court to include all matters which it is plain the parties intended to express but did not, and all matters which the law implies as part of the whole contract.

§ 56. *Usages of Trade.* — A contract is always construed to contain not only the express agreement of the parties, but all its implied incidents. Every trade and business has its usages and these usages are a part of the contract although not mentioned in it.² A person employing a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though the principal himself be ignorant of them.³ “A person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place.”⁴ The same is true as to written contracts. In the hurry of bargain and trade, and in all the transactions of busy men, only a portion of the real bargain is actually written out. In all contracts as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages. They commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included, however, as of course by mutual understanding.⁵ If a party were to contract with another to

¹ *Re Great Berlin Steamship Co.*, 26 Ch.Div. 616; and see *Herman v. Jeuchner*, 15 Q. B. D. 561; overruling *Wilson v. Sheynell*, 7 Q. B. D. 548.

² See *post*, § 333.

³ *Lawson on Usages and Customs*, § 20.

⁴ *Id.*

⁵ *Lawson on Usages and Customs*, § 183.

convey a lion, there could be no doubt that evidence would be admissible to show that it was customary to deliver animals of that description in cages.¹ And it would therefore be an implied term in the contract that the seller should furnish a cage even though nothing at all was said in the contract about cages.

§ 57. In Contracts of Sale.—The seller of an article of personal property impliedly warrants its title, *i. e.*, that it is his to sell.² The seller of negotiable paper impliedly warrants that it is his to sell, and that it is genuine;³ the seller of a land-warrant, that it is valid;⁴ the seller of accounts, that they are genuine and owing.⁵ But there is no implied warranty of title where the seller has not the chattel in his possession,⁶ nor where the sale is by an agent.⁷

Except in Louisiana and South Carolina⁸ on the sale of a specific article of personal property there is, in general, no warranty of the quality of the article sold, and the maxim

¹ *Robertson v. Jackson*, 2 C. B. 412.

² *Burt v. Deney*, 40 N. Y. 283; 100 Am. Dec. 482; *Edgerton v. Michels*, 66 Wis. 124; *Lile v. Hopkins*, 12 S. & M. 299; 61 Am. Dec. 115; *Brown v. Pierce*, 97 Mass. 46; 93 Am. Dec. 87; *Costigan v. Hawkins*, 22 Wis. 74; 94 Am. Dec. 563; *Defreeze v. Trumper*, 1 Johns. 274; 3 Am. Dec. 329; *Lanier v. Auld*, 1 Murph. 38; 8 Am. Dec. 680; *Chism v. Woods*, Hardin, 531; 3 Am. Dec. 740; *Boyd v. Anderson*, 1 Over. 438; 3 Am. Dec. 762; *Charnley v. Dulles*, 8 Watts. & S. 5; *Dorsey v. Jackman*, 1 Serg. & R. 42; 7 Am. Dec. 611; *Perley v. Balch*, 23 Pick. 283; 34 Am. Dec. 56; *Strong v. Barnes*, 11 Vt. 221; 34 Am. Dec. 684; *Chancellor v. Wiggins*, 4 B. Mon. 201; 39 Am. Dec. 499; *Barton v. Faherty*, 3 G. Greene, 327; 54 Am. Dec. 508.

³ *Bell v. Cafferty*, 21 Ind. 411; *Merriman v. Wolcott*, 3 Allen, 258; 80 Am. Dec. 69; *Thompson v. McCullough*, 31 Mo. 224; 77 Am. Dec. 644; *Flynn v. Allen*, 57 Pa. St. 482; *McCay v. Barber*, 37 Ga. 423; *Aldrich v. Jackson*, 5 R. I. 218; *Curtis v. Brooks*, 37 Barb. 476; *Lob-*

dell v. Baker, 1 Metc. 193; *Tyler v. Bailey* 71 Ill. 34.

⁴ *Presbury v. Morris*, 18 Mo. 165.

⁵ *Gilchrist v. Hilliard*, 53 Vt. 592; 23 Am. Rep. 706; *Kingsley v. Fitts*, 55 Vt. 283; *Marshall v. Morgan*, 58 Vt. 60.

⁶ *Scranton v. Clark*, 39 N. Y. 221; 100 Am. Dec. 420; *Huntingdon v. Hall*, 36 Me. 501; 58 Am. Dec. 765; *Scott v. Hix*, 2 Sneed, 192; 62 Am. Dec. 458; *Lackey v. Stouder*, 2 Ind. 376; *Boyd v. Bopst*, 2 Dall. 91; *Byrnside v. Burdett*, 15 W. Va. 702; *Long v. Hockingbottom*, 28 Miss. 772; 64 Am. Dec. 118; *Storm v. Smith*, 43 Miss. 497.

⁷ *Forsythe v. Ellis*, 4 J. J. Marsh, 296; 20 Am. Dec. 218; *Harris v. Lynn*, 25 Kas. 281; 37 Am. Rep. 253; *The Monte Allegre*, 9 Wheat. 616; *Davis v. Murray*, 2 Mill, 143; 12 Am. Dec. 661; *Warthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399.

⁸ *Parsons on Contracts*, 564; *Timrod v. Shoolbred*, 1 Bay, 324; 1 Am. Dec. 620; *Whitefield v. McLeod*, 2 Bay, 380; 1 Am. Dec. 650; *Vanderhost v. MacTaggart*, 1 Brev. 269; 2 Am. Dec. 667; *Houston v. Gilbert*, 3 Brev. 63; 5 Am. Dec. 542.

caveat emptor applies.¹ A warranty of quality is never implied where the seller is guilty of no fraud and the buyer has had an opportunity of examining the goods for himself.² There is no warranty of quality on the sale of lands.³

But to the rule *caveat emptor* there are many exceptions, and in these exceptive cases a warranty is implied although not actually given at all, viz. :

(a) Where goods are sold for a particular purpose (that purpose and not any specific article being the essence of the contract) there is an implied warranty that the article is reasonably fit for that purpose.⁴

¹ *Hight v. Bacon*, 126 Mass. 10; 30 Am. Rep. 639; *Dickson v. Jordan*, 11 Ired. 166; 53 Am. Dec. 403; *Becker v. Branner*, 18 Ill. App. 39; *Johnston v. Cope*, 3 Har. & J. 69; 5 Am. Dec. 423; *Hyatt v. Boyle*, 5 Gill & J. 119; 25 Am. Dec. 276; *Rice v. Forsyth*, 41 Md. 389; *Jones v. Jost*, L. R. 3 Q. B. 202; *Windsor v. Lombard*, 18 Pick. 60; *Salem Rubber Co. v. Adams*, 33 Pick. 256; *Bryant v. Pender*, 45 Vt. 487; *Carley v. Wilkens*, 6 Barb. 557; *Moses v. Mead*, 1 Denio, 379; 45 Am. Dec. 676; *Wilbur v. Cartwright*, 44 Barb. 536; *Frazier v. Harvey*, 34 Conn. 469; *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757; *Otto v. Alderson*, 10 Smedes & M. 473; *Tewksbury v. Bennett*, 31 Iowa, 83; *Hadley v. Clinton Co. Imp. Co.*, 13 Ohio St. 503; 83 Am. Dec. 454; *Irving v. Thomas*, 18 Me. 418; *Dean v. Mason*, 4 Conn. 428; 10 Am. Dec. 163; *Seixas v. Woods*, 2 Calnes, 48; 3 Am. Dec. 215; *Holden v. Daken*, 4 Johns. 421; *Hotchkiss v. Gage*, 26 Barb. 141; *Swett v. Colgate*, 30 Johns. 196; 11 Am. Dec. 257; *Defreeze v. Trumper*, 1 Johns. 274; 3 Am. Dec. 329; *Barnard v. Kellogg*, 10 Wall. 288; *Fleming v. Slocum*, 18 Johns. 403; 9 Am. Dec. 234; *Erwin v. Maxwell*, 3 Murph. 241; 9 Am. Dec. 603; *Westmoreland v. Dixon*, 4 Hayw. (Tenn.) 223; 23 Am. Dec. 763; *Welsh v. Carter*, 1 Wend. 185; 19 Am. Dec. 473; *Waring v. Mason*, 18 Wend. 444; *West v. Cunningham*, 9 Port. 104; 33 Am. Dec. 300; *Mixer v. Coburn*, 11 Met. 558; 45 Am. Dec. 230; *Kingsbury v. Taylor*, 29 Me. 508; 50 Am. Dec. 607; *Eagan v. Oall*, 34 Pa. St. 236;

75 Dec. 653; *Welmer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411.

² *Carnochan v. Gould*, 1 Bailey, 179; 19 Am. Dec. 668; *Stewart v. Dugan*, 4 Mo. 295; 23 Am. Dec. 348.

³ *Gimblin v. Harrison*, Sneed. 815; 2 Am. Dec. 730; *Pollard v. Lyman*, 1 Day, 156; 2 Am. Dec. 63.

⁴ *Gerst v. Jones*, 32 Gratt. 521; 34 Am. Rep. 773; *Brenton v. Davis*, 8 Blackf. 317; 44 Am. Dec. 799; *Snow v. Schomacker*, 69 Ala. 111; 44 Am. Rep. 507; *Poland v. Muler*, 95 Ind. 387; 48 Am. Rep. 730; *Sims v. Howells*, 49 Ga. 620; *Kimball Mfg. Co. v. Vrooman*, 35 Mich. 310; 24 Am. Rep. 558; *Beers v. Williams*, 16 Ill. 69; *Union Hide Co. v. Reissig*, 48 Ill. 75; *Page v. Ford*, 12 Ind. 46; *Brenton v. Davis*, 8 Black. 317; 44 Am. Dec. 769; *Bird v. Mayer*, 8 Wis. 362; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737; *Street v. Chapman*, 29 Ind. 142; *Bonn v. Clark*, 35 Vt. 577; *Chapin v. Dobson*, 78 N. Y. 82; 34 Am. Rep. 512; *Getty v. Rountree*, 2 Pinn. 379; 54 Am. Dec. 183; *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Wilson v. Dunville*, L. R. 4 Ir. Rep. 249; *Robertson v. Amazon Tug Co.*, L. R. 7 Q. B. D. 598; *Smith v. Baker*, 40 L. J. (N. S.) 261; *Macfarlane v. Taylor*, L. R. 1 Sc. & Div. 245; *Snelgrove v. Bruce*, 16 U. C. C. P. 561; *Baker v. Lynam*, 38 U. C. Q. B. 498; *Bigelow v. Boxall*, 38 U. C. Q. B. 452; *Howard v. Hoey*, 23 Wend. 830; 35 Am. Dec. 572; *Van Wycke v. Allen*, 69 N. Y. 61; 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13; *Hanger v.*

(b) Where an article is ordered to be manufactured, there is an implied contract that it shall be of merchantable quality.¹

(c) Where goods are sold by kind or description, in the absence of an express stipulation as to the quality, it is an implied condition of the contract that the seller shall supply such goods as are commercially known under the description, and of a merchantable or salable quality, and in a merchantable state.²

(d) Where goods are sold by a sample shown to the buyer, a warranty is implied that the goods delivered shall correspond in quality to the sample.³ But there is no

Evans, 38 Ark. 334; Wolcott v. Mount, 38 N. J. L. 496; 20 Am. Rep. 425; Taylor v. Cole, 111 Mass. 363; Merrill v. Nightingale, 39 Wis. 247; Robson v. Miller, 12 S. C. 586; 32 Am. Rep. 518; Gerst v. Jones, 32 Gratt. 518; 34 Am. Rep. 778; Gammell v. Gunby, 52 Ga. 504; Wilcox v. Owens, 64 Ga. 601; Jones v. Bryst, 5 Bing. 533; Pease v. Sabin, 38 Vt. 482; 91 Am. Dec. 364; Brown v. Edgington, 2 Man. & G. 279; Ollivant v. Bailey, 5 Q. B. 288; Jones v. Just, L. R. 8 Q. B. 202; 37 L. J. Q. B. 95; Hoe v. Sanborn, 21 N. Y. 552; 78 Am. Dec. 163; Dounce v. Dow, 64 N. Y. 411; Rodgers v. Niles, 11 Ohio St. 48; 78 Am. Dec. 290; Byers v. Chapin, 28 Ohio St. 300; Mason v. Chappell, 15 Gratt. 572. Where the party supplying articles for a particular purpose is not a manufacturer, but only a dealer, it is held in some cases that he does not impliedly warrant their quality or fitness. Dounce v. Dow, 64 N. Y. 411; Bartlett v. Hoppock, 34 N. Y. 118; 88 Am. Dec. 428; Wright v. Hart, 18 Wend. 449; Bragg v. Morrill, 49 Vt. 45; 24 Am. Rep. 102; Tilton Co. v. Tisdale, 48 Vt. 83; Farrow v. Andrews, 69 Ala. 96. But the true doctrine is that the implied warranty is not limited to cases where the vendor is also the manufacturer of the article, but extends to all cases where the buyer relies upon the skill and judgment of the seller. Brown v. Edgington, 2 Scott, N. R. 496, and cases cited at the beginning of this note.

¹ Hargous v. Stone, 5 N. Y. 86; Woodlee v. Whitney, 23 Wis. 55; 99 Am. Dec. 102; Howard v. Hoey, 23 Wend. 350; 35 Am. Dec. 572; Reed v. Randle, 29 N. Y. 385; 86 Am. Dec. 305; Norris v. LaFarge, 3 E. D. Smith, 379; Clew v. McPherson, 1 Bosw. 486; Hamilton v. Ganyard, 3 Keyes, 46; Babcock v. Trice, 18 Ill. 420; 68 Am. Dec. 560; Fisk v. Tank, 12 Wis. 276; 78 Am. Dec. 737; Page v. Ford, 12 Ind. 46; Sweat v. Shumway, 102 Mass. 365; 3 Am. Rep. 471; Edwards v. Hathaway, 1 Phila. 547.

² Laing v. Fidgeon, 6 Taunt. 108; Gardiner v. Gray, 4 Camp. 144; Jo-ling v. Kingsford, 13 Com. B. (N. S.) 447; 32 L. J. Com. P. 94; Jones v. Just, L. R. 3 Q. B. 199; 37 L. J. Q. B. 89; Borrekens v. Bevan, 3 Rawle, 23; 23 Am. Dec. 85; Dailey v. Green, 15 Pa. St. 125; Wieler v. Schilizzi, 17 Com. B. 619; Nicholas v. Godts, 10 Ex. 119; Jennings v. Gratz, 3 Rawle, 168; 23 Am. Dec. 111; Henshaw v. Robins, 9 Met. 83; 43 Am. Dec. 367; Van Wyck v. Allen, 69 N. Y. 61; 26 Am. Rep. 136; Hawkins v. Pemberton, 51 N. Y. 198; 10 Am. Rep. 556.

³ Bradford v. Manly, 18 Mass. 136; 7 Am. Dec. 123; Williams v. Spofford, 8 Pick. 250; Dickenson v. Gay, 7 Allen, 29; 83 Am. Dec. 636; Moses v. Mead, 1 Denio 378; 43 Am. Dec. 676; Oneida Mfg. Soc. v. Lawrence, 4 Cow. 440; Gallagher v. Waring, 9 Wend. 20; Boorman v. Jenkins, 13 Wend. 566; 27 Am. Dec. 158; Waring v. Mason, 18 Wend. 425; Hargous v. Stone, 5 N. Y. 73; Ricks v. Dallahunt

implied warranty of their merchantability,¹ unless the quality cannot be judged of from the sample.²

(e) On the sale by dealers of articles intended for food, there is an implied warranty that they are wholesome.³ But there is no such implied warranty where the articles are sold, not for immediate domestic use, but to be traded in or sold again.⁴

§ 58. In Contracts of Agency and Service. — One who agrees to perform a particular service, as agent or servant, impliedly agrees to perform it faithfully, carefully, and with reasonable skill,⁵ and though the contract expressly states certain contingencies on which the relation may be put an end to by the master, any breach of duty on the part of the servant will give the master a right to discharge him, because they are breaches of the implied promise of the servant to serve the master faithfully.⁶ And when one contracts with another as agent, he impliedly warrants to that other that he has authority from his superior to make the contract.⁷

On the other hand, without any special agreement,

8 Port. 140; *Day v. Baguet*, 14 Minn. 273; *Brantley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264; *Otto v. Alderson*, 10 Smedes & M. 476; *Borrekins v. Bevan*, 3 Rawle, 37; *Hanson v. Busse*, 45 Ill. 498; *Gunther v. Atwell*, 19 Md. 157; *Mages v. Billingsly*, 3 Ala. 679; *Gurney v. R. R. Co.*, 58 N. Y. 364; *Fraley v. Bispham*, 10 Pa. St. 320; 51 Am. Dec. 487; *Fuller v. Cowell*, 8 La. Ann. 136; 58 Am. Dec. 676; *Mine v. Donnell*, 12 La. Ann. 369; *Hall v. Plassan*, 19 La. Ann. 11; *Boyd v. Wilson*, 83 Pa. St. 219; 24 Am. Rep. 176; *Myer v. Wheeler*, 65 Iowa, 290; *Dayton v. Hoagland*, 29 Ohio St. 671; *Conrad v. Dator*, 2 Biss. 242; *Foot v. Deutly*, 44 N. Y. 166; 4 Am. Rep. 652; *Hubbard v. George*, 49 Ill. 275.

¹ *Parkinson v. Lee*, 2 East, 314; *Randall v. Newson*, L. R. 2 Q. B. Div. 102; *Sands v. Taylor*, 5 Johns. 395; 4 Am. Dec. 374; *Gatchet v. Warren*, 73 Ala. 238.

² *Mody v. Gregson*, L. R. 4 Ex. 49;

Boyd v. Wilson, 83 Pa. St. 325; 24 Am. Rep. 176.

³ *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 339; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Wright v. Hart*, 13 Wend. 449; *Burch v. Spencer*, 15 Hun, 504; *Ely v. O'Leary*, 2 E. D. Smith, 361; *Miller v. Scherder*, 2 N. Y. 267; *McNaughton v. Joy*, 1 Week. Not. Cas. 470; *Ryder v. Neitge*, 6 Heisk. 340; *Hoover v. Peters*, 18 Mich. 51; *Winsor v. Lombard*, 13 Pick. 61; *Sinclair v. Hathaway*, 57 Mich. 60; 58 Am. Rep. 327.

⁴ *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676; *Emerson v. Brigham*, 10 Mass. 197; 6 Am. Dec. 109; *Ryder v. Neitge*, 21 Minn. 70; *Humphreys v. Comline*, 8 Blackf. 516; *Divine v. McCormick*, 50 Barb. 116; *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 606.

⁵ See post, § 190; Agency.

⁶ *Lawson Rights, Rem. & Pr.*, § 270.

⁷ Post, § 193; Agency.

the principal impliedly promises the agent to re-imburse him for any disbursements or losses he may be charged with in the conduct of the agency.¹ Where the defendant employed an auctioneer to sell her estate, and the auctioneer was compelled in the course of the proceedings to pay certain duties to the crown, it was held that the fact of employment implied a promise by the defendant to repay the amount of the duties, and entitled the auctioneer to recover them.²

The powers of an agent include not only those actually given him, but also all the necessary and usual means of executing them, and all the means justified by the usage of the particular agency.³ A person who employs an attorney at law impliedly authorizes such acts on his part as he, the attorney, deems to be legal, necessary and proper in the prosecution of the suit.⁴ The authority of an agent may be implied from the acts of the principal, and so may his ratification of an act done without his authority.⁵ It is implied in a contract of agency that it shall come to an end by the occurrence of any legal cause for dissolution.⁶

¹ *Post*, § 179;

² *Brittain v. Lloyd*, 14 M. & W. 763.

³ *Lawson Rights, Rem. & Pr.*, § 60; *Lawson on Usages and Customs*, § 148, *cf seq.*; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 238. As to the implied powers of auctioneers see *Lawson Rights, Rem. & Pr.*, § 215; of brokers, *Id.*, § 223; of factors, *Id.*, § 228; of bill brokers, *Id.*, § 229; of insurance brokers, *Id.*, § 232.

⁴ *Foster v. Wiley*, 27 Mich. 344; *Union Bk. v. Geary*, 5 Pet. 98; *Farmers Bk. v. Ketchum*, 4 McLean, 120; *Hart v. Spalding*, 1 Cal. 212; *Connors v. Younger*, 29

Cal. 147, 87 Am. Dec. 164; *Gorham v. Gale*, 7 Conn. 729; *Lacoste v. Robert*, 11 La. Ann. 33; *Lawson v. Bettison*, 12 Ark. 401; see *Lawson Rights, Rem. & Pr.*, § 170, *cf seq.*

⁵ *Lawson Rights, Rem. & Pr.*, § 57.

⁶ See *post*, § 302. A good illustration of the principle of this section is found in the case of a photographer. On his taking a picture for a customer there arises an implied contract that the negative shall only be used for the printing of such portraits as the customer may order or authorize. *Moore v. Rugg*, 44 Minn. 28; 20 Am. St. Rep. 539.

CHAPTER III.

THE FORM.

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- 88. Acceptance and receipt.
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§ 59. **The Different Kinds of Contracts.**— There is but one formal contract in our law, the deed or contract under seal; all others are simple contracts depending for their validity upon the presence of consideration. Therefore contracts are divisible into two classes—contracts under seal or specialties, and simple contracts or contracts not under seal, called also parol contracts. There is no distinct class of contracts merely in writing.¹

Statutes, however, have been passed by the legislatures which impose upon some of these simple contracts the necessity of some kind of form, and these stand in an

¹ *Perrine v. Oheeseman*, 11 N. J. L.; P. & W. 405; *Stabler v. Cowman*, 7 Gill & 19 Am. Dec. 838; *Whitehill v. Wilson*, 3 J. 234.

intermediate position between the *deed* to which its form alone gives legal force, and the *simple contract* which rests upon consideration and is free from the imposition of any statutory form. In addition to these a certain class of obligation has been imported into the law of contract under the title of contracts of record, and though these obligations are wanting in the principal features of contract, it is necessary, in deference to established authority, to treat of them here.¹

Contracts may then be classified as follows: 1st. Formal contracts, *i. e.*, those which depend for their validity upon their form, and under this division fall contracts of record and contracts under seal, the latter being called also specialties. 2d. Simple contracts, *i. e.*, those which are dependent for their validity upon the presence of consideration, and under this division fall contracts which are required by statute or law to be in some particular form other than under seal, and contracts for which no form is required.

1.

CONTRACTS OF RECORD.

§ 60. *Contracts of Record.* — The contracts of record are judgments and recognizances. A judgment is the decision or determination of a court of competent jurisdiction upon the matters submitted to it, and evidenced by its record.² A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. This obligation may come into existence as the final result of litigation when the court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. Where it

¹ Anson Contr. 43.

² Abb. Law Dict. Title Judgment; Whitwell v. Emory, 3 Mich. 84; Knapp

v. Roche, 82 N. Y. 386; Peirce v. City of Boston, 3 Metc. 520.

is so created the obligation results from a contract for the making of which certain formalities are required; this contract is either a *warrant of attorney*, by which one party gives authority to the other to enter judgment upon terms settled, or a *cognovit*, by which the one party acknowledges the right of the other in respect of the pending dispute and then gives a similar authority.¹

The main characteristics of a judgment are: 1. Its terms are conclusively proved by the production of the record, and it is binding and conclusive upon the parties and privies, upon the same subject-matter, in any court, until it is regularly vacated or reversed by some court in a proceeding for that purpose.² 2. It merges or extinguishes all previous existing rights.³ 3. The party in whose favor judgment is given, has certain advantages which an ordinary creditor does not possess. He may take out execution upon the judgment and so obtain directly the sum called for by it, or he may bring an action upon the judgment.

A *recognizance* is an obligation of record entered into before some court of record, usually to secure attendance of the party at court to answer some charge or suit against him.⁴

2.

CONTRACTS UNDER SEAL.

§ 61. *Contracts Under Seal.*—The formal contract of our law is the *contract under seal*, also called a deed and sometimes a specialty. It is called a *formal contract*, because it derives its validity from its form alone, and not from the fact of agreement, nor from the consideration which may exist for the promise of either

¹ Anson Contr. 44. See *Teague v. Perry*, 64 N. C. 89.

² *La Grange v. Ward*, 11 Ohio, 257; *Pennywit v. Foote*, 27 Ohio St. 608; *Strong v. Lawrence*, 58 Ia. 55; *The Rio Grande*, 23 Wall. 458; *Hollister v.*

Abbott, 31 N. H. 443; *Oregonian Ry. Co. v. Oregon Ry.*, 37 Fed. Rep. 377.

³ See *post*, Merger.

⁴ *Abb. Law Dict. Tit. "Recognizance."* See *State v. Weatherwax*, 12 Kan. 468.

party. The subject of "deeds" belongs to a work on Real Property and not to a work like this on the general subject of Contracts. We shall therefore consider briefly in this place how the deed is made, what are its chief characteristics as distinguished from simple contracts, and under what circumstances it is necessary to contract under seal.

§ 62. **Contract Under Seal, How Made.** — A deed must be in writing or printed on paper or parchment.¹ It must be signed, sealed and delivered. At common law signing was not essential, but in the United States it is.² A seal was always necessary, which at common law was an "impression on wax or paper or some other tenacious substance capable of being impressed,"³ and thus a printed impression of a seal on a paper is not a seal;⁴ nor a scrawl with a pen;⁵ nor a slit in the parchment with a ribbon run through it.⁶ In some States by statute, a scrawl is sufficient,⁷ while in some the necessity of a seal has been abolished.⁸

Witnesses are not essential to the validity of a deed unless required by statute,⁹ though as a matter of caution and for the easier proof of its execution it is better to have a deed attested.¹⁰ And in a number of States, by statute, witnesses are necessary to the validity of a deed

¹ Lawson Rights, Rem. & Pr., § 2226.

² Lawson Rights, Rem. & Pr., § 2270.

³ 4 Kent Com. 452; Perrine v. Cheeseman, 11 N. J. (L.) 14; 19 Am. Dec. 388; Tasker v. Bartlett, 5 Cush. 359; Warren v. Lynch, 5 Johns. 245; Pease v. Lawson, 23 Mo. 35.

⁴ Mitchell v. Union Life Ins. Co., 45 Me. 105; 71 Am. Dec. 529; Richard v. Boller, 6 Daly, 460.

⁵ Warren v. Lynch, 5 Johns. 245; Hendricks v. Briggs, 15 Neb. 469.

⁶ Duncan v. Duncan, 1 Watts, 232.

⁷ Stimson's American Statute Law, § 1565; Michigan, Wisconsin, New Jersey, Minnesota, Virginia, West Virginia, California, Oregon, Colorado, Missouri, Florida, Mississippi, Illinois.

⁸ Stimson's American Statute Law, § 1565; Ohio, Indiana, Iowa, Kansas, Nebraska, Tennessee, Texas, Dakota, Kentucky, Mississippi. Pierson v. Armstrong, 1 Iowa, 232; 63 Am. Dec. 440. In some States a seal may be by an impression on paper as well as upon wax or affixing a wafer. Connecticut, Ohio, Rhode Island, Idaho. Pillow v. Roberts, 13 How. 472; Pierce v. Indrest, 106 U. S. 54.

⁹ 4 Kent Com. 451; Reinhart v. Miller, 22 Ga. 402; 68 Am. Dec. 506; Dole v. Thurlow, 12 Meta. 166; Meuley v. Ziegler, 23 Tex. 88; Long v. Ramsey, 1 S. & R. 72.

¹⁰ Dole v. Thurlow, 12 Meta. 166.

between the parties,¹ and where these are in force, such attestation is essential to a valid conveyance.² So where a statute requires deeds to be executed in the presence of two witnesses, a deed executed in the presence of one only is void.³

Delivery is essential to give effect to a deed, whether it be founded on a consideration or not.⁴ Without delivery all the preceding formalities are unavailable:⁵ with delivery the deed becomes absolute, and cannot be defeated by the grantor by any subsequent act, unless by virtue of some power contained in it, or for fraud or the like.⁶ Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing.⁷

Acceptance by the grantee is likewise essential, for the title will not pass until the deed has been accepted,⁸ and the grantee must accept before the rights of third parties have intervened; otherwise, he will take subject to their rights.⁹

¹ Lawson Rights, Rem. & Pr., § 2271.

² Meyhen v. Strong, 6 Minn. 177; 80 Am. Dec. 441; Crane v. Reeder, 21 Mich. 24; 4 Am. Rep. 430.

³ Clark v. Graham, 6 Wheat. 577.

⁴ Van Amringe v. Morton, 4 Whart.

382; 34 Am. Dec. 517; Jones v. Jones, 6 Conn. 111; 16 Am. Dec. 35; Fisher v.

Hall, 41 N. Y. 421, 422; Younge v. Gall-

bean, 3 Wall. 641; Armstrong v. Stovall,

26 Miss. 275; Miller v. Physick, 24 Ark.

224; Fitch v. Bunch, 30 Cal. 208; Merrills

v. Swift, 18 Conn. 261; 46 Am. Dec. 315;

Oliver v. Stone, 24 Ga. 63; Whitaker v.

Miller, 33 Ill. 381; Mitchell v. Skinner,

17 Kan. 535; Hughes v. Easten, 4 J. J.

Marsh. 573; 20 Am. Dec. 230; Brown v.

Brown, 66 Me. 316; Berkshire Fire Ins.

Co. v. Sturgis, 13 Gray, 178; Heffron v.

Flanigan, 37 Mich. 274; Green v. Yar-

nall, 6 Mo. 326; Davis v. Lumpkin, 57

Miss. 506; Patrick v. McCormick, 10

Neb. 15; Hammell v. Hammell, 10 Ohio,

7; McPherson v. Featherstone, 37 Wis.

632; Dikes v. Miller, 24 Tex. 417; Church v. Gilman, 15 Wend. 656; 80 Am. Dec. 82.

⁵ Younge v. Gallbean, 3 Wall. 641; Fisher v. Beckworth, 30 Wis. 55; Brown v. Brown, 66 Me. 316.

⁶ Lawson Rights, Rem. & Pr., § 2276.

⁷ Lawson Rights, Rem. & Pr., § 2276.

⁸ Cabett v. Norcross, 35 N. H. 99;

Mitchell v. Ryan, 3 Ohio St. 377; Comer

v. Baldwin, 16 Minn. 172; Dikes v. Miller,

24 Tex. 417; McFadgen v. Elensmidt, 29

Tenn. 567; Bell v. Farmers' Bank, 11

Bush, 34; 21 Am. Rep. 205; White v. Brad-

ley, 66 Me. 254; Leppoc v. Nat. Union

Bank, 32 Md. 136; Kearny v. Jeffries, 48

Miss. 343.

⁹ Bell v. Farmers' Bank, 11 Bush, 34;

21 Am. Rep. 205; Parmelee v. Simpson, 5

Wall. 81; Tuttle v. Turner, 23 Tex. 759;

McPherson v. Featherstone, 37 Mo. 632;

Day v. Griffith, 15 Iowa, 437; Johnson v.

Farley, 45 N. H. 505.

But acceptance is presumed where the instrument is beneficial to the grantee.¹

When a deed is delivered on a condition that it is not to take effect until something happens, during such period it is termed an *escrow*, but immediately upon the fulfillment of the condition it becomes operative and acquires the character of a deed.² A delivery in escrow can only be made to a third person. If made to the grantee, or to the grantee's agent only, it is not an escrow, and parol evidence that it was conditional is inadmissible;³ nor is it an escrow where the grantor retains the right of control over it.⁴ The escrow takes effect immediately upon the performance of the condition without any formal delivery over by the depository. The latter becomes at once the agent or trustee for the grantee.⁵

§ 63. *Estoppel by Deed.* — Statements made in a simple contract, though strong evidence against the parties to the contract, are not absolutely conclusive against them. Statements made in a deed are absolutely conclusive against the parties to the deed in any *legal proceedings* between them taken upon the deed. "The principle is that where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."⁶ Such a prohibition to deny facts is termed an *estoppel*.⁷

¹ *Lawson Rights, Rem. & Pr.*, § 2276; *Halluck v. Bush*, 3 Root, 28; 1 Am. Dec. 66; *Peavey v. Tilton*, 18 N. H. 183; 44 Am. Dec. 365; *Renfro v. Harrison*, 10 Mo. 411; *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147; *Bovely v. Davis*, 20 N. H. 140; 51 Am. Dec. 210; *Mitchell v. Ryan*, 3 Ohio St. 577.

² *Lawson Rights, Rem. & Pr.*, § 2277; *Printsman v. Butler*, 30 Wis. 644; 11 Am. Rep. 594; *Harbruder v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *State Bk. v. Evans*, 15 N. J. (L.) 155; 28 Am. Dec. 400.

³ *Lawson Rights, Rem. & Pr.*, § 2277; *Worrall v. Minn.* 5 N. Y. 229; 55 Am. Dec. 330; *Miller v. Fletcher*, 27 Gratt. 403; 21

Am. Rep. 356; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235; *Ordinary, etc. v. Thatcher*, 41 N. J. (L.) 403; 32 Am. Rep. 325; *Foley v. Cowgill*, 5 Blackf. 18; 32 Am. Dec. 49; *Stevenson v. Campbell*, 114 Ill. 19.

⁴ *Campbell v. Thomas*, 42 Wis. 437; 24 Am. Rep. 427.

⁵ *Couch v. Meeker*, 2 Conn. 302; 7 Am. Dec. 274; *Printsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592.

⁶ *Taunton, J.*, in *Bowman v. Taylor*, 2 Ad. & Ell. 278.

⁷ *Lawson Rights, Rem. & Pr.*, § 2284; *Van Rensselaer v. Kearney*, 11 How. 322; *Gerry v. Stimpson*, 60 Me. 186; *Beers v.*

§ 64. **Merger.**—Where two parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is *merged* in the deed and becomes extinct.¹

§ 65. **Contract Under Seal Valid Without Consideration.**—A gratuitous promise or promise for which the promisor obtains no consideration present or future, is binding if made under seal, though the same promise would be void if made verbally, or in writing not under seal.²

In most States want of consideration may be shown in defense to an action on a sealed instrument.³ This is generally regulated by statute. By the California code “a written instrument is presumptive evidence of consideration,” and “all distinctions between sealed and unsealed instruments are abolished.” The statutes of Iowa, Kentucky, Kansas and Indiana contain similar provisions. In *Aller v. Aller*,⁴ a statute providing that in an action on a sealed instrument, “the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted,” came before the court for construction. The plaintiff had received from her father as a present a note, under seal, containing a promise to pay her a certain sum of money. In an action on the note want of consideration was relied on as a defense. It was held that the statute permitting the defense of want of consideration does not apply to contracts under seal, wherein it is manifested that the parties intended and understood that there should be no consideration; that the mischief which the statute was

Beers, 22 Mich. 42; *Sage v. Jones*, 47 Ind. 122; *Howard v. Massengale*, 13 Lea, 577; *Dobbin v. Oruger*, 108 Ill. 188; *Green v. Clark*, 13 Vt. 158.

¹ See *post*.

² *Page v. Trugart*, 2 Mass. 159; 3 Am. Dec. 41; *Smith v. Smith*, 36 Ga. 184; 91 Am. Dec. 761; *McClanahan v. Henderson*, 2 A. K. Marsh, 388; 12 Am. Dec. 412;

Ousack v. White, 2 Mill, 279; 12 Am. Dec. 669.

³ *Wing v. Chase*, 35 Mo. 260; *Cass v. Broughton*, 11 Wend. 106; *Gray v. Hadkinson*, 1 Bay, 278; *Solomon v. Kimmel*, 5 Binn. 223; *McCarty v. Beach*, 10 Cal. 461.

⁴ 40 N. J. (L.) 446.

designed to remedy was, that where the parties intended there should be a consideration, they were prevented by the common law from showing none if the contract was under seal; and that the statute was not intended to abolish all distinctions between specialties and simple contracts, and to deprive one of the right to make a binding voluntary promise, if he so desired, provided he used such solemnities in form as had long been recognized as sufficient to express such desire and intention.¹

An agreement in restraint of trade requires at common law a consideration to support it, even though under seal, and this is said to be the only case in which a contract of specialty is void, merely because it is without actual consideration.² But it is always open to the party sued upon a specialty to show that the consideration was illegal or immoral.³

§ 66. In What Cases Contract under Seal Necessary.—It is not necessary that a person shall, in making a contract, employ a deed, except in those cases where that form is required either by the rules of the common law or by statute. There are cases in which the common law demands that a contract shall be made under seal and these are: (a) gratuitous promises, (b) contracts of corporations, (c) conveyances of real estate.

(a) A gratuitous promise or contract for which there is no consideration must be made by deed, otherwise it will be void.⁴

(b) The common law rule as to contracts made with corporations was that a *corporation can only be bound by contracts under the seal of the corporation*. A corporation being a fictitious, not a natural person, some evidence, it was said, is required that the aggregate of individuals com-

¹ See also *Candor's Appeal*, 27 Pa. St. 119.

² *Metc. Contr.* 270; *Ross v. Sadgbeer*, 21 Wend. 161.

³ *Collins v. Blantern*, 1 Smith Lead. Cas. 369.

⁴ See post, § 91.

posing it is really bound to that which the contract purports to promise, and this evidence is supplied by the use of the seal common to the corporation. But this requisite, in the United States at least, cannot be said any longer to exist, for it is now well settled that the contracts which a corporation has the power to make may be made in the same manner that a natural person would make them, in the absence of any special restriction in the charter.¹

(c) A deed is essential to convey the legal title to real property.² Whether this was a common law requisite or not³ it is certain that the word conveyance always meant a sealed instrument⁴ and the statutes of the different States generally require this formality.⁵

3.

SIMPLE CONTRACTS.

§ 67. *Simple Contracts.* — Having discussed the contract which acquires validity by reason of its form alone, we pass to the contract which depends for its validity upon the presence of consideration. In other words, we pass from the formal to the simple contract, or from the contract under seal to the *parol* contract, so called because, with certain exceptions to which reference will now be made, it can be entered into by word of mouth. A contract (subject to the cases just noted where it is required to be made under seal, and subject to the cases in the next section where it is required to be evidenced by a writing) is perfectly valid if entered into by word of mouth.⁶

¹ *Bank of Columbia v. Patterson*, 7 Cranch. 299; *Lawson Rights, Rem. & Pr.*, § 405.

² *Crowell v. Maughs*, 7 Ill. 419; 43 Am. Dec. 62. See *Whiting v. Sweet*, 22 N. H. 10; 53 Am. Dec. 223.

³ See *Tiedeman on Real Prop.*, § 783.

⁴ *McCabe v. Hunter*, 7 Mo. 356.

⁵ See *Kingsley v. Holbrook*, 45 N. H. 311; 36 Am. Dec. 173.

⁶ A proposal for a contract, to be reduced to writing, even if accepted, is

§ 68. **Simple Contracts Required to be in Writing.** — There are certain simple contracts which are not enforceable unless in writing, but the form of the contract in these cases is simply the evidence of its existence, and consideration is as necessary as if the contract were oral. They are therefore none the less simple contracts, because written evidence of their terms is required. The only case in which writing as a matter of form is required in simple contracts at common law is in the case of bills of exchange which, by the custom of merchants, adopted with the common law, must be in writing. But by statute certain contracts must be in writing; as for example assignments of patents or copyrights,¹ a promise of an infant to pay his debt made during infancy,² an acknowledgment of a debt barred by statute, and in Missouri an acceptance of a bill of exchange.³ But the legislation which has had the greatest effect in preventing the making of oral contracts is the celebrated statute of Frauds passed in the reign of Charles II., and whose provisions have been incorporated into the statutes of nearly all the States. The sections of that statute which we have here to deal with are the 4th and 17th, and we shall consider them in their order.

not binding upon either party until the agreement has been reduced to writing and signed. *The Governor v. Petch*, 28 E. L. & Eq. 470; *McDonald v. Bewick*, 51 Mich. 79; *Bourne v. Shapleigh*, 9 Mo. App. 64. If nothing remains, however, but to reduce the contract to writing, according to terms explicitly agreed upon, it may be immaterial that it has not been done, unless it appears that the parties intended not to be bound until their agreement was reduced to writing. *Id.*; *Blaney v. Hoke*, 14 Ohio St. 296; *Eads v. Carondelet*, 42 Mo. 118; *Thomas v. Dering*, 15 Eng. Ch. 729; *Morrill v. Tobama*, 10 Nev. 125; *Methudy v. Ross*, 10 Mo. App. 106; *Commissioners v. Rhodes*, 36 Ohio St. 411. The inquiry is whether the parties have finally assented to the terms of a contract, and simply provided that such

terms shall be evidenced by a writing to be drawn up, or whether they have only agreed to make a contract which shall not bind them until reduced to writing and signed. *Pomeroy on Cont. § 62*. An insurance contract though usually under seal may be made by word of mouth, *Sanborn v. Ins. Co.*, 16 Gray. 448; 77 Am. Dec. 419; *Relief Ins. Co. v. Shaw*, 94 U. S. 174; *Security Ins. Co. v. Ins. Co.*, 7 Bush. 81; 3 Am. Rep. 701; *Ellis v. Ins. Co.* 50 N. Y. 402; 10 Am. Rep. 195; *Moody v. Ins. Co.*, 31 Gratt. 392; 81 Am. Rep. 732; *Putnam v. Ins. Co.*, 123 Mass. 324; 25 Am. Rep. 93; *Lingenfelter v. Ins. Co.*, 19 Mo. App. 252.

¹ See *post*, Assignment.

² See *post*, Parties.

³ *Scudder v. Bank*, 91 U. S. 406.

4.

THE STATUTE OF FRAUDS, 4TH SECTION.

§ 69. **Introductory.** The 4th section of the statute of Frauds enacts that “ *no action shall be brought* (1) to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (2) to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or (3) to charge any person upon any agreement made in consideration of marriage; or (4) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or (5) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.”

We shall discuss this section of the statute under three heads, viz.: (a) The kinds of contracts included in it; (b) The form required by the statute; (c) The effect of non-compliance with its provisions.

(a) *What Contracts are Within the Statute.*

§ 70. **Special Promise by Executor or Administrator.**—An executor or administrator may sue or be sued upon obligations devolving upon him as representative of the deceased, and it is his duty to carry out the directions of the deceased in respect to legacies and to distribute the estate according to the laws of descent and distribution. But he is not bound to pay out his own money, his liabilities being limited by the assets of the estate in his hands. But if for any reason he chooses to promise to answer

damages out of his own estate the promise must be in writing.¹ And in this, as in all other contracts under this section, the fact that there is a writing will not bind him if there is no consideration for the promise.²

§ 71. Promise to Answer for "Debt, Default or Mis-carriage of Another."—(a) In order to fall within this clause there must be a *debt of another*, and hence the statute does not refer to an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor.³ In other words, there must be three parties in contemplation; A, who is actually or prospectively liable to B, and C, who in consideration of some act or forbearance on the part of B promises to answer for the debt, default, or miscarriage of A. A, a bailiff for example is about to arrest B. C promises to pay a certain sum on a given day to A if he will forbear to arrest B.⁴ Or C promises B to indemnify B if he loses anything by going bail for A.⁵ These are all independent promises of indemnity from C to B which need not be in writing.⁶ And therefore the debt must not be the debt of the promisor or the debt of the promisee.⁷

(b) The "other," i. e., the original debtor, must be primarily liable. If the original debtor be discharged, the promise becomes an independent contract, is not within the statute, and need not be in writing.⁸ As put in a lead-

¹ Meta. Contr. 189.

² Rann v. Hughes, 7 T. R. 350.

³ Anderson v. Spence, 72 Ind. 315; 37 Am. Rep. 162; Aldrich v. Ames, 9 Gray, 76; Barry v. Ranson, 12 N. Y. 462.

⁴ Reader v. Kingham, 13 O. B. (N. S.) 244.

⁵ Anderson v. Spence, 72 Ind. 315; 37 Am. Rep. 162.

⁶ Marcy v. Crawford, 16 Conn. 549; 41 Am. Dec. 188; Beaman v. Russell, 20 Vt. 208; 49 Am. Dec. 775; Harrison v. Samtall, 10 Johns. 242; 6 Am. Dec. 387.

⁷ Windell v. Hudson, 108 Ind. 521; Bailey v. Bailey, 56 Vt. 398; Green v.

Estes, 88 Mo. 337; Underhill v. Gibson, 2 N. H. 353; 9 Am. Dec. 82; Corbett v. Cochran, 8 Hill (S. C.) 41; 80 Am. Dec. 348; Jones v. Hardisty, 10 Gill & J. 404; 32 Am. Dec. 180; Curtis v. Brown, 5 Cush. 491; Dows v. Sweet, 120 Mass. 323; Eddy v. Roberts, 17 Ill. 407; Doyle v. White, 28 Me. 341; 45 Am. Dec. 110; Taylor v. Drake, 4 Strob. 431; 53 Am. Dec. 680.

⁸ Anderson v. Davis, 9 Vt. 126; 31 Am. Dec. 612; Watson v. Jacobs, 29 Vt. 171; Spann v. Baltzell, 1 Fla. 301; 46 Am. Dec. 346; Warren v. Smith, 24 Tex. 484; 78 Am. Dec. 115; Andre v. Bodman, 13 Md. 241; 71 Am. Dec. 628; Wallace v.

ing American case on the subject: "In case one says to another, 'Deliver goods to A, and I will pay you,' it is binding, though by parol, because A, though he receives the goods, is never liable to pay for them. But if, in the same case, he says, 'I will see you paid,' or 'I will pay, if he does not,' or uses words equivalent, showing that the debt is in the first instance the debt of A, the undertaking is collateral, and not valid, unless in writing:"¹ To ascertain whether an undertaking to pay the debt of another is collateral or original, the inquiry is: To whom was the credit given at the time of the sale and delivery of the goods?²

(c) The liability of the third party must be continuous. If there be an existing debt for which a third party is liable to the promisee, and the promisor undertake to be answerable for it, the contract need not be in writing if its terms are such that it effects an extinguishment of the original liability.³

(d.) The promise must be made to the creditor and not to the debtor himself.⁴

(e) The liability of the promisor must be to answer for the debt, default or miscarriage out of his own property. Therefore if the promisor has funds or goods in his hands belonging to the debtor, from which or from whose proceeds he has authority⁵ and is under a duty⁶ to pay the debt, the promise is not within the statute, because the

Wortham, 25 Miss. 119; 57 Am. Dec. 197; Packer v. Benton, 35 Conn. 343; 95 Am. Dec. 249; Maurin v. Fogelberg, 37 Minn. 23; 5 Am. St. Rep. 815.

¹ Nelson v. Boynton, 8 Metc. 396; 37 Am. Dec. 148; Birkmyer v. Darnell, Salk. 27; 1 Sm. Lead Cas. 57.

² Myer v. Grafflin, 31 Md. 350; 100 Am. Dec. 66; Greene v. Burton, 59 Vt. 423; Grant v. Wolf, 34 Minn. 32; Cole v. Hutchinson, 34 Minn. 410; Langdon v. Richardson, 58 Ia. 610; Bugbee v. Kendrick, 130 Mass. 437.

³ Palmer v. Witcherly, 15 Neb. 98; Teters v. Lamborn, 43 Ohio St. 144;

Carlisle v. Campbell, 76 Ala. 247; Meriden Co., v. Zingsen, 48 N. Y. 247; Howell v. Field, 70 Ga. 592; Wood v. Corcoran, 1 Allen, 406; Runde v. Runde, 59 Ill. 98.

⁴ Aldrich v. Jewell, 12 Vt. 125; 36 Am. Dec. 330; Alger v. Scoville, 1 Gray, 395; Meyer v. Hartman, 72 Ill. 442; Rabbermann v. Wiskamp, 54 Ill. 177; Eastwood v. Kenyon, 11 Ad. & E. 438.

⁵ Gower v. Stuart, 40 Mich. 747; Frame v. August, 38 Ill. 424.

⁶ Fullam v. Adams, 37 Vt. 391, 397; Belknap v. Bender, 75 N. Y. 446, 451; Ackley v. Parmenter, 98 N. Y. 425, 430.

debt is really to be paid by the debtor; the responsibility assumed by the promisor being that of a trustee for the creditor.¹

(f) The promise must not be merely incidental to a transaction, where the main effect of the promisor is to promote some interest of his own² as where the holder of a promissory note transfers it for value and guarantees the payment of the note;³ or where an agent (called a *del credere* agent) undertakes, for an increased commission, to sell the goods of his employer and guarantee the solvency of the purchasers;⁴ or, where the creditor of a third person has some lien or advantage for securing the debt which incumbers the property or may injuriously affect the interests of the promisor, and the promise is made in consideration of the relinquishment of such lien or advantage.⁵

The statute includes liabilities arising out of wrong as well as out of contract. Thus where A wrongfully rode the horse of B without his leave, and killed it, and C promised to pay B a certain sum in consideration of his forbearing to sue A, this was held, a promise to answer for the *miscarriage* of another within the meaning of the statute.⁶

§ 72. "Agreements in Consideration of Marriage."—

The agreement here meant is not a promise to marry (the consideration for this is the promise of the other party),⁷ but a promise to make a payment of money or a settlement

¹ *Wait v. Wait*, 28 Vt. 350; *Farley v. Cleveland*, 4 Cow. 432; *Eddy v. Roberts*, 17 Ill. 505; *Prather v. Vineyard*, 9 Ill. 40; *Walden v. Karr*, 88 Ill. 49.

² *Benj. Princ. of Contr.* 40.

³ *Cardell v. McNeil*, 21 N. Y. 336; *Milks v. Rich*, 80 N. Y. 269; *Dows v. Swett*, 124 Mass. 142; *Darst v. Bates*, 95 Ill. 512.

⁴ *Wolf v. Koppel*, 5 Hill, 458; 2 Denio, 206; *Conturier v. Hastie*, 8 Exch. 40; 5 H. L. 673; *Swan v. Nesmith*, 7 Pick. 220; *Sherwood v. Stone*, 14 N. Y. 287.

⁵ *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Wills v. Brown*, 118 Mass. 187; *Mallory v. Gillett*, 21 N. Y. 412; *Prime v. Koehler*, 77 N. Y. 91; *Crawford v. King*, 54 Ind. 6; *Eddy v. Roberts*, 17 Ill., 508; *Scott v. White*, 71 Ill. 287; *Borchsenius v. Canutson*, 100 Ill. 82; *Power v. Rankin*, 114 Ill. 52.

⁶ *Kirkham v. Marter*, 2 B. & Ald. 613.

⁷ *Short v. Stotts*, 58 Ind. 29; *Withers v. Richardson*, 5 T. B. Mon. 94; 17 Am. Dec. 44; *Clark v. Pendleton*, 20 Conn. 495; *Blackburn v. Mann*, 85 Ill. 222.

of property in consideration of, or conditional upon a marriage actually taking place.¹

§ 73. "Interest in or Concerning Lands."—The meaning of "a contract for the sale of lands, tenements and hereditaments" is clear enough and is arrived at when once we know what is meant by lands, tenements and hereditaments. And these terms have a precise meaning in the law, as any work on Real Property will show. They denote the subject of real as distinguished from personal property, i. e., goods and chattels. Every one knows what land is; tenements include every species of real property which may be held, or in respect of which a person may be a tenant,² while "hereditaments" is employed in conveyances after "lands" and "tenements" to include everything of the nature of realty which they do not cover.³ Therefore a verbal contract for the purchase or sale of land, or of any kind of real property, is clearly within the statute.⁴ While it is not so easy to determine what is an "interest in land" within the meaning of this section, it is certain that the contract must be for a substantial interest in land, and not for arrangements preliminary to the acquisition of an interest, or for a remote and inappreciable interest.⁵

As to the produce of land a distinction is made between what are called *fructus industriales* or growing crops of annual culture raised by the industry of man, and growing grass, timber or fruit upon trees, called *fructus naturales*, which come to man by the course of nature, unaided by his own exertions. The former are regarded as chattel

¹ Finch v. Finch, 10 Ohio St. 501; Henry v. Henry, 27 Ohio St. 121; Caylor v. Roe, 99 Ind. 1; Chase v. Fitz, 122 Mass. 359; Flenner v. Flenner, 29 Ind. 564; McAnnulty v. McAnnulty, 130 Ill. 28; Lloyd v. Fulton, 91 U. S. 479.

² Abb. Law Dict. 548.

³ Rapalje & L. Law Dict. 603.

⁴ Lawson's Rights, Rem. & Pr., § 2324;

Williams v. Gibson, 81 Ala. 238; 5 Am. St. Rep. 363.

⁵ Murley v. Ennis, 2 Col. 309; Miller v. Roberts, 18 Tex. 16; 67 Am. Dec. 633; Burrell v. Root, 40 N. Y. 496; Mahagan v. Mead, 63 N. H. 130; Bruce v. Hastings, 41 Vt. 280; 98 Am. Dec. 522; Snyder v. Wolford, 33 Miss. 175; 53 Am. Rep. 22.

interests and not within the statute.¹ As to *fructus naturales*, if the contract for their sale contemplates the passing of the property thereon before it is severed from the soil, it is a sale of an interest in land,² while if the crops are to be delivered as goods and to pass no title until severed, the contract is not within the statute, and no writing is required.³

But the subject of this section is one which belongs to the sale and purchase of Real Property rather than to the law of Contract.

§ 74. **Contracts not to be Performed Within a Year.** — This phrase refers to such contracts only as are incapable of being completely performed within a year, and therefore although the agreement is not likely to be performed and not expected to be performed within one year from the making thereof, still it does not come within the statute, unless it cannot by any possibility, within the terms of the contract, be fulfilled or completed within the space of a year.⁴ The following classes of contracts would not come within the statute, viz.:

(a) Contracts for personal service for an indefinite period or for a term of years, and which will terminate with the death of the party making them, because such contracts

¹ *Davis v. McFarland*, 37 Cal. 634; 20 Am. Dec. 340; *Whipple v. Foot*, 2 Johns. 418; *Marshall v. Ferguson*, 23 Cal. 65; *Northern v. State*, 1 Ind. 113; *Graff v. Fitch*, 58 Ill. 573; *Ross v. Welch*, 11 Gray, 253; *Evans v. Roberts*, 5 B. & O. 202. But see *Kerr v. Hill*, 27 W. Va. 576.

² *Green v. Armstrong*, 1 Denio, 550; *Blouin v. Seymour*, 36 N. J. (L.) 128; *White v. Foster*, 15 Gray, 441; *Pattison's Appeal*, 61 Pa. St. 394; *McClintock's Appeal*, 71 Pa. St. 335; *Powers v. Clarkson*, 17 Kan. 218; *Crosby v. Wadsworth*, 6 East, 602.

³ *Leake on Contracts*, 232; *Clafflin v. Carpenter*, 4 Met. 580; 38 Am. Dec. 331; *Poor v. Oakman*, 104 Mass. 316; *Furner v. Piercy*, 46 Md. 212; 17 Am. Rep. 591;

Byassee v. Reese, 4 Met. (Ky.), 372; 83 Am. Dec. 461; *Vulceovich v. Skinner*, 77 Cal. 339.

⁴ *Lyon v. Kling*, 11 Metc. 411; 45 Am. Dec. 219; *Worthey v. Jones*, 11 Gray 170; 71 Am. Dec. 696; *Blanding v. Sargent*, 33 N. H. 239; 66 Am. Dec. 721; *Laphan v. Whipple*, 8 Metc. 87; 41 Am. Dec. 487; *Moore v. Fox*, 10 Johns. 244; 6 Am. Dec. 338; *Peters v. Westburgh*, 19 Pick. 364; 31 Am. Dec. 143; *Linscott v. McEntire*, 15 Me. 201; 33 Am. Dec. 603; *Gadsden v. Lance*, 1 McMuell, Eq. 87; 37 Am. Dec. 548; *Homer v. Frazer*, 65 Md. 1; *Kent v. Kent*, 62 N. Y. 580; *Frazer v. Gates*, 118 Ill. 99; *McPherson v. Cox*, 96 U. S. 404; *Walker v. Johnson*, 96 U. S. 424.

may by the death of the party be fully performed within the year.¹

(b) Contracts to be performed on the happening of a contingency which may or may not arise within a year.² As an agreement to pay a certain sum of money at another's death;³ or a contract to pay money upon the return of a ship which might return within a year, although the ship in fact did not return within two years;⁴ or a contract to pay a sum of money to a person on the day of his marriage, although the marriage did not take place within a year.⁵

(c) Contracts to pay money from time to time, or to render some service until a specified contingency arises. As, for instance, to support a person during life, or to educate a child; for such person may die within the year, in which event the contract would be performed;⁶ or an agreement to labor for a company "for the term of five years, or so long as A shall continue to be agent of the company;"⁷ or a contract of partnership without any fixed time for its continuance, and the business of which may be completed within a year;⁸ or a promise by a railroad to retain the plaintiff in its employ so long as he should remain disabled from an injury received; inasmuch as recovery might happen within a year.⁹

¹ *Hill v. Jameson*, 16 Ind. 125; 79 Am. Dec. 414.

² *Trustees of Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Roberts v. Rockton Co.*, 7 Metc. 46; *Updike v. Tenbrook*, 83 N. J. (L.) 105; *Clark v. Pendleton*, 20 Conn. 495; *Houghton v. Houghton*, 14 Ind. 505; *Blakeney v. Goodale*, 30 Ohio St. 350; *Gonzales v. Cartier*, 63 Tex. 36; *Jones v. Pouch*, 41 Ohio St. 145; *Cole v. Singerly*, 60 Md. 348; *Heflin v. Milton*, 69 Ala. 354; *Niagara Fire Ins. Co. v. Green*, 77 Ind. 590.

³ *Updike v. Tenbrook*, 83 N. J. (L.) 105; *Kent v. Kent*, 63 N. Y. 560; 20 Am. Rep. 502; *Jilson v. Gilbert*, 26 Wis. 687; 7 Am. Rep. 100.

⁴ *Anonymous*, 1 Salk. 280.

⁵ *Peter v. Compton*, 8 Kin. 353; 18m. Lead. Cas. 283.

⁶ *Heath v. Heath*, 31 Wis. 223; *Bull v. McCrae*, 8 B. Mon. 422; *Bell v. Hewitt*, 24 Ind. 280; *Harper v. Harper*, 57 Ind. 548; *Kent v. Kent*, 63 N. Y. 560; *Hutchinson v. Hutchinson*, 46 Me. 154; *Dresser v. Dresser*, 35 Barb. 573; *Blake v. Cole*, 22 Pick. 97; *Howard v. Burgen*, 4 Dana, 137.

⁷ *Roberts v. Rockbottom Co.*, 7 Metc. 46.

⁸ *Jordan v. Miller*, 75 Va. 442.

⁹ *East Tenn., etc., R. Co. v. Staub*, 7 Lea, 397.

(d) Contracts not to do certain acts, as for instance not to engage in a certain business for a term of years or an indefinite term¹ as they are only personal engagements to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, and would be fully performed if the promisor died within the year.

(e) Contracts which may be performed within a year on one side, though they cannot be performed within a year on the other.²

(f) Agreements where everything that is to be done under them is to be done within the year except the mere payment of money.³

Contracts which by their terms are not to be fully performed within a year are within the statute,⁴ and a contract which cannot be performed within a year is not taken out of the statute because it may be terminated or defeated within a year.⁵

It is held that this clause of the statute applies to agreements to marry⁶ but not to contracts concerning lands or any interest therein.⁷

¹ *Hill v. Jameson*, 16 Ind. 125; 79 Am. Dec. 414; *Lyon v. King*, 11 Metc. 411; 45 Am. Dec. 219; *Doyle v. Dixon*, 97 Mass. 212; 83 Am. Dec. 80; *Worth v. Jones*, 11 Gray, 168; 71 Am. Dec. 696; *Richardson v. Pierce*, 7 R. I. 330.

² *Donellan v. Reed*, 3 B. & Ald. 809; *Bracegirdle v. Heald*, 1 Barn. & Ald. 727; *Blanding v. Sargent*, 33 N. H. 239; 66 Am. Dec. 720; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 287; *McClellan v. Sandford*, 26 Wis. 595; *Wolke v. Fleming*, 103 Ind. 110; *Jones v. Hardesty*, 10 G. & J. 404; *Berry v. Doremus*, 30 N. J. (L.) 399; *Compton v. Martin*, 5 Rich. 14; *Holbrook v. Armstrong*, 10 Me. 31. Some courts, however, hold that although that which one of the parties to the agreement is to do is all to be done within the year, still if the other party's promise is not to be performed within the year, the contract is within the statute.

Whipple v. Parker, 29 Mich. 375; *Sheehy v. Adarene*, 41 Vt. 541; 98 Am. Dec. 623; *Frar v. Sterling*, 99 Mass. 461; *Montague v. Garrett*, 3 Bush, 297; *Broadwell v. Getman*, 3 Denio, 87. But the party has a remedy not on the contract but on an implied assumption. *Whipple v. Parker*, 29 Mich. 375.

³ *Curtis v. Sage*, 35 Ill. 22; *Worden v. Sharp*, 56 Ill. 104.

⁴ *Foote v. Emerson*, 10 Vt. 338; 83 Am. Dec. 205; *Lockwood v. Barnes*, 3 Hill, 128; 38 Am. Dec. 620; *Crosswell v. Crane*, 7 Barb. 200; *Weir v. Hill*, 3 Lans. 282; *Amburger v. Marvin*, 4 E. D. Smith, 395.

⁵ *Meyer v. Roberts*, 48 Ark. 80; 55 Am. Rep. 567.

⁶ *Derby v. Phelps*, 2 N. H. 515; *Lawrence v. Cook*, 56 Me. 190; *Nichols v. Weaver*, 7 Kan. 377.

⁷ *Fall v. Hazelrigg*, 45 Ind. 566; 15 Am. Rep. 278; *Railsback v. Walke*, 81

§ 75. **What Agreements Not Within the Statute.** — A promise which arises by operation of law is not within the statute;¹ nor a parol declaration of trust in lands;² nor instruments created under and deriving their obligation from special statutes, without the acceptance or assent of the party for whose ultimate benefit they were given;³ nor executed contracts or verbal contracts which have been fully performed.⁴

(b) *Form Required by the Statute.*

§ 76. **General Principles.** — The contract is not void because not put in writing as required by the statute. The only effect of a non-compliance with the provisions of the statute is simply that no action can be brought until the omission is made good. The parties may carry out their oral engagements if they please, but the court will not hear evidence of any contract within the statute of frauds unless it is put in the form required by the statute.⁵

The refusal of a party to fulfill his promise to put it in writing is not such a fraud as will take the contract out of the statute of frauds.⁶ A contract required by the statute of frauds to be in writing cannot be subsequently modified by parol,⁷ and a verbal contract within the statute cannot be made the ground of a defense any more than of a demand.⁸ The statute, if relied on as a defense, must be

Ind. 412; *Mason v. Breslin*, 9 Abb. Pr., (N. S.) 432; 40 How. Pr. 441; 2 *Sweeney*, 392; *Reeder v. Sayre*, 6 Hun, 564; *Young v. Dake*, 5 N. Y. 463; 55 Am. Dec. 356; *Whiting v. Ohlert*, 52 Mich. 462.

¹ *Smith v. Bradley*, 1 Root, 150; *Goodwin v. Gilbert*, 9 Mass. 510.

² *Wiser v. Allen*, 92 Pa. St. 317.

³ *Doolittle v. Dininny*, 31 N. Y. 350.

⁴ *Swansey v. Moore*, 23 Ill. 63; 74 Am. Dec. 124; *Nutting v. McCutcheon*, 5 Minn. 383; *Stone v. Dennison*, 13 Pick. 1; *James v. Morey*, 44 Ill. 352.

⁵ *Lawson Rights, Rem. & Pr.*, § 2321;

Newton v. Bronson, 13 N. Y. 537; *Gale v. Nixon*, 6 Cow. 445; *Bird v. Munroe*, 66 Me. 337; *Heideman v. Wolfstein*, 12 Mo. (App.) 366; *Townsend v. Hargraves*, 118 Mass. 334; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Montgomery v. Edwards*, 48 Ill. 181.

⁶ *Caylor v. Roe*, 99 Ind. 1.

⁷ *Abell v. Munson*, 13 Mich. 306; 100 Am. Dec. 165.

⁸ *King v. Welcome*, 5 Gray, 41, 42; *Wheeler v. Frankenthal*, 78 Ill. 134; *Creighton v. Sanders*, 89 Ill. 543; *McGinnis v. Fernandes*, 136 Ill. 228.

pleaded, or it will be deemed waived.¹ Its benefits are personal and can be relied on only by the parties or their privies.² The contract may be made at one time and the memorandum of it at any subsequent time³ between the formation of the contract and the commencement of an action.⁴

§ 77. **Memorandum Must Show a Complete Contract.**—The note or memorandum must contain the terms of a complete contract between the parties, and if any essential term is wanting the memorandum is insufficient.⁵ This will be so if it appears therefrom that some of the details of the contract remain to be settled between the parties.⁶

The memorandum may be any kind of a writing; as for example, a letter;⁷ an invoice or bill of goods;⁸ brokers' bought and sold notes;⁹ or an entry on the books of the party.¹⁰ It need not be addressed or delivered to the other contracting party.¹¹ While no particular form is required of the memorandum,¹² and it is not necessary that all the details of the agreement shall be given, yet it must state the contract with reasonable certainty (so that the substance of it can be understood without having recourse to

¹ *Maybee v. Moore*, 30 Mo. 340; *McClure v. Otrich*, 118 Ill. 320.

² *Chicago Dock Co. v. Kinzie*, 49 Ill. 239; *Heuser v. Lamont*, 55 Pa. St. 311; *Cahill v. Bigelow*, 18 Pick. 369.

³ *Gale v. Nixon*, 6 Cow. 445.

⁴ *Bird v. Munroe*, 66 Me. 337; *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dixon*, 22 Q. B. Div. 357. But as the action is not brought on the memorandum, but on the contract, would it not be more logical to hold that it might be made after the commencement of the action if before it is necessary to offer it in evidence to prove the contract? See *Tiedeman Sales*, § 72.

⁵ *Leake Contr.* 289; *Baley v. Ogden*, 3 Johns. 339; 3 Am. Dec. 509; *Abell v. Radcliff*, 13 Johns. 297; 7 Am. Dec. 377.

⁶ *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814.

⁷ *Jackson v. Lowe*, 1 Bing. 9; *Napier v. French*, 40 N. Y. Sup. Ct. 122. *Peabody v. Speyers*, 56 N. Y. 230; *Spangler v. Danforth*, 65 Ill. 169; *Moss v. Atkinson*, 44 Cal. 3.

⁸ *Schneider v. Norris*, 2 Maule & S. 286.

⁹ *Goom v. Affalo*, 6 Barn. & C. 117; *Newberry v. Wall*, 84 N. Y. 576; *Greeley-Burnham Co. v. Capen*, 23 Mo. App. 301; *Elliot v. Barrett*, 144 Mass. 256.

¹⁰ *Argus Co. v. Albany*, 55 N. Y. 495; *Tufts v. Plymouth Co.*, 14 Allen, 407.

¹¹ *Welford v. Beazely*, 3 Atk. 503; *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343.

¹² *Hawley v. Brown*, 99 Mass. 545; 96 Am. Dec. 671; *McConnell v. Brillhart*, 17 Ill. 354; 65 Am. Dec. 661.

parol proof)¹ either directly from the writing itself, or by reference to some other instrument, record, or other matter by which such certainty may be had;² and parol evidence is admissible for the purpose of identifying the subject-matter to which the writing refers.³

The note or memorandum may consist of several writings, if they are sufficiently connected together by internal reference, or by being so physically attached as to indicate an intention to make them a part of the memorandum⁴ and parol evidence is admissible to apply the references and to identify the writings referred to.⁵ But several writings cannot be connected by parol evidence only, without any internal reference or connection, for the purpose of making a note or memorandum to satisfy the statute.⁶ In *Boydell v. Drummond*,⁷ a publishing firm issued a prospectus of illustrations of Shakespeare, to be published on terms of subscription therein set out. D entered his name in the shop in a book entitled "Shakespeare Subscribers, their signatures," but afterwards refused to subscribe. He was sued upon his promise to do so, but it was held that as there was nothing said in the book signed by D about the prospectus there was nothing to connect the subscription book with the prospectus, so as to make a sufficient memorandum of the contract, and that the deficiency might not be made good by parol evidence.

¹ *Bailey v. Ogden*, 3 Johns. 390; 3 Am. Dec. 509; *Abeel v. Radcliff*, 3 Johns. Ch. 297; 7 Am. Dec. 377; *Hazard v. Deny*, 14 Allen, 487; 93 Am. Dec. 790; *Eggleston v. Wagner*, 46 Mich. 610; *Tice v. Freeman*, 30 Minn. 339; *Peck v. Vandemark*, 99 N. Y. 29; *Wiely v. Robert*, 27 Mo. 388; *King v. Wood*, 7 Mo. 337; *Fry v. Platt*, 32 Kan. 63.

² *Atwood v. Cobb*, 16 Pick. 227; 26 Am. Dec. 657; *Frazier v. Howe*, 106 Ill. 563.

³ *Barry v. Coombe*, 1 Pet. 640; *Tallman v. Franklin*, 14 N. Y. 584; *Mead v. Parker*, 115 Miss. 413; *McConnell v. Brillhart*, 17 Ill. 334; *Cossitt v. Hobbs*, 56 Ill. 231.

⁴ *Tallman v. Franklin*, 14 N. Y. 584; *Orne v. Cook*, 31 Ill. 238.

⁵ *Peck v. Vandemark*, 99 N. Y. 29; *Morton v. Dean*, 18 Metc. 385; *Whelan v. Sullivan*, 102 Mass. 204; *Doughty v. Manhattan Brew. Co.*, 101 N. Y. 644; *Thayer v. Luce*, 22 Ohio St. 62; *Rhoades v. Castner*, 12 Allen, 130.

⁶ *Boeckeler v. McGowan*, 12 Mo. (App.) 507; *O'Donnell v. Leeman*, 43 Me. 158; *Tallman v. Franklin*, 14 N. Y. 504; *North v. Mendel*, 73 Ga. 400; *Watt v. Wisconsin Co.*, 63 Ia. 730; *Adams v. McMillan*, 7 Port. 73.

⁷ 11 East, 142.

"If," said the court, "there had been anything in the book which had referred to the particular prospectus, that would have been sufficient * * * but as the signature now stands without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus and saying that it was the prospectus exhibited in his shop at the time to which the signature related; the case therefore falls directly within this branch of the statute of frauds."

§ 78. **Must Show Parties.**—The memorandum of the contract must show who are the parties to it.¹ Thus where A promised B that he would answer for the debt of C, but the memorandum of the promise, though signed by A, did not contain the name of B; it was held to be insufficient. "No document," it was said in that case, "can be an agreement or a memorandum of one, which does not show on its face who the parties making the agreement are."² But a description of one of the contracting parties, though he be not named, will let in parol evidence otherwise inadmissible to show his identity.³ So where A as agent for B enters into a contract with C in his own name, C may prove that he has really contracted with B, who has been described in the memorandum in the character of A.⁴

§ 79. **Consideration.**—On the ground that the word "agreement" as used in the statute includes the *consideration* as well as the promise, it was early held in the English courts that the consideration for the promise must appear in the memorandum.⁵ This ruling has been followed in

¹ *Sherborne v. Shaw*, 1 N. H. 157; 8 Am. Dec. 47; *McConnell v. Brillhart*, 17 Ill. 354, *Grafton v. Cummings*, 99 U. S. 100.

² *Williams v. Lako*, 2 E. & E. 349.

³ *Jones v. Dow*, 142 Mass. 130; *Fessenden v. Mussey*, 11 Cush. 127; *Dykes v. Townsend*, 24 N. Y. 57; *Thornton v.*

Keely, 17 Ill. 354; *McConnell v. Brillhart*, 17 Ill. 354.

⁴ *Trueman v. Loder*, 11 Ad. & E. 599; *Lerned v. Johns*, 9 Allen, 419; *Violette v. Powell*, 10 B. Mon. 347; 53 Am. Dec. 548.

⁵ *Wain v. Walters*, 5 East, 10; 2 Sm. Lead Cas. 280; *Saunders v. Wakefield*, 4 B. & A. 596.

New York and some other States,¹ but the weight of authority in the United States appears to be the other way.² In Alabama, Minnesota, Nevada and Oregon, it is enacted by statute that the consideration shall be stated in the memorandum, while in Indiana, Illinois, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey and Virginia, the statutes provide that the consideration need not be expressed.

§ 80. **Must be Signed by Party Charged.**—By the “party to be charged” the defendant in the action is meant.³ Therefore a memorandum signed by one party only is sufficient to charge him, although there be no signed writing upon which to charge the other party; and a person may be thus chargeable on a contract although the remedy on his part might fail for want of evidence to satisfy the statute.⁴

The signature need not be an actual subscription of the party's name, it may be a mark, or by initials;⁵ nor need it be in writing, it may be printed or stamped, or in

¹ *Sears v. Brink*, 3 Johns. 210; 3 Am. Dec. 475; *Justice v. Lang*, 42 N. Y. 522; 1 Am. Rep. 576; *Church v. Brown*, 21 N. Y. 315; *Drake v. Seaman*, 37 Hun, 63; *Wright v. Weeks*, 3 Bosw. 372; *Wilson v. Roberts*, 5 Bosw. 100; *Ido v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698.

² *Packard v. Richardson*, 17 Mass. 122; 9 Am. Dec. 123; *Silkins v. Watson*, 12 Tex. 199; *How v. Kimball*, 2 McLean, 103; *Sage v. Wilcox*, 6 Conn. 81; *Read v. Evans*, 17 Ohio, 128; *Ives v. Hazard*, 4 R. L. 14; 67 Am. Dec. 501; *Gilligan v. Boardman*, 29 Me. 81; *Halsa v. Halsa*, 8 Mo. 305; *Shively v. Black*, 45 Pa. St. 345; *Britton v. Angier*, 48 N. H. 422; *Taylor v. Ross*, 3 Yerg. 330; *Steadman v. Guthrie*, 4 Meto. (Ky) 147.

³ *Newby v. Rogers*, 40 Ind. 9.

⁴ *Justice v. Lang*, 42 N. Y. 498; 1 Am. Rep. 576; *Douglass v. Spears*, Nott & McC. 207; 10 Am. Dec. 588; *Russell v. Nicoll*, 3 Wend. 112; 29 Am. Dec. 670; *McOrea v. Furmort*, 16 Wend. 460; 30 Am.

Dec. 103; *Johnson v. Dodge*, 17 Ill. 442; *Farwell v. Lowther*, 18 Ill. 255; *Estes v. Furlong*, 59 Ill. 312; *Worrall v. Minn.* 5 N. Y. 246; 55 Am. Dec. 330; *Briggs v. Partridge*, 64 N. Y. 364; 21 Am. Rep. 617; *Edwards v. Ins. Co.*, 21 Wend. 492; *Champlin v. Parrish*, 11 Paige, 410; *Woodward v. Aspinwall*, 3 Sand. 276; *Earl v. Campbell*, 14 How. Pr., 332; *White v. Schuyler*, 31 How. Pr. 41; *Old Colony R. R. Co. v. Evans*, 6 Gray, 32; 66 Am. Dec. 394; *Ives v. Hazard*, 4 R. L. 81; 67 Am. Dec. 500; *Gattrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767; *Mason v. Decker*, 72 N. Y. 575; 23 Am. Rep. 190. *Contra*, *Thomas v. Trustees*, 3 A. K. Marsh. 298; 13 Am. Dec. 165; *Corbet v. Gas Co.*, 6 Or. 405; 25 Am. Rep. 540; *Krohn v. Bantz*, 68 Ind. 277; *Wilkinson v. Heavenrich*, 58 Mich. 578.

⁵ *Lawson's Rights*, Rem. & Pr., § 2330; *Sanborn v. Flagler*, 9 Allen, 418; *Brown v. Bank*, 6 Hill, 443; *Palmer v. Stephens*, 1 Denio, 408.

pencil;¹ nor need it be placed at the end of the document, it may be at the beginning or in the middle.² But it must be intended to be a signature, and as such to be a recognition of the contract.³

§ 81. *Signing by Agent.* — The statute permits the signing to be done by an agent duly authorized, and therefore provided one has the necessary authority his signature will bind his principal. But it is held that the agent must be some third person and cannot be the other contracting party.⁴ If the agent signs it in his own name, the other party may show that the contract was really made with the principal.⁵ In some States the authority in the case of dealing with lands must be in writing.⁶

(c) *Effect of Non-Compliance.*

§ 82. *Contract Not Void But Simply Unenforceable.* — A contract of the kind specified in this section of the statute of frauds, and not in writing, is not void, for the effect of non-compliance with its provisions is simply to prevent it being enforced by an action, or in other words it is incapable in a judicial tribunal of being proved orally.⁷ In *Leroux v. Brown*,⁸ the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a

¹ *Drury v. Young*, 58 Md. 543; 42 Am. Rep. 345; *Bennett v. Bromfelt*, L. R. 3 C. P. 25; *Lucas v. James*, 7 Hare, 419; *Clason v. Merritt*, 14 Johns. 484; *Weston v. Myers*, 33 Ill. 424.

² *Clason v. Bailey*, 14 Johns. 484; *Coddington v. Goddard*, 16 Gray, 436; *McConnell v. Brillhart*, 17 Ill. 361; *O'Donnell v. Breher*, 36 N. J. (L.) 257; *James v. Patten*, 8 Barb. 344. *Aliter* where the statute uses the word "subscribed." *James v. Patten*, 6 N. Y. 9; 55 Am. Dec. 376; *Champlin v. Parrish*, 11 Paige, 406; *McGovern v. Fleming*, 12 Daly, 232.

³ *Selby v. Selby*, 3 Mer. 2; *Lucas v. James*, 7 Hare, 419; *Boardman v. Spooner*, 13 Allen, 353; *Braley v. Kelly*, 25 Minn. 160.

⁴ *Bent v. Cobb*, 9 Gray, 337; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720.

⁵ *Dykers v. Townsend*, 24 N. Y. 57, 60; *Sanborn v. Flagler*, 9 Allen, p. 477; *Williams v. Bacon*, 2 Gray, 337, 338; *Trueman v. Loder*, 11 Ad. & E. 589.

⁶ See *post*, § 169; *Parties*.

⁷ See *ante*, § 76.

⁸ 12 C. B. 301.

case, and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the law of the place where it is made, called the *lex loci contractus*. The procedure, however, in trying the rights of parties under a contract, is governed by the law of the place where the action is brought, called the *lex fori*, and the mode of proof thus depends on the law of the country where action is brought. If, therefore, the statute avoided contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where it was made, and the *lex loci contractus* would have been applicable. If, on the other hand, the statute affected procedure only, the contract, though not void, was incapable of proof in the English courts. The plaintiff tried to show that his contract was void by English law, in which case he would have been successful, for there would have been nothing to hinder his proving first the contract, and then the French law which made it valid. But the Court of Common Pleas held that the statute dealt with procedure only, that the existence of the contract was not affected by it, but that it was rendered incapable of proof and the plaintiff therefore could not recover.¹

The converse of this proposition is also true. Had the statute of frauds existed in France at the time the contract

¹ This case is approved in *Downer v. Chesbrough*, 36 Conn. 39, and also in *Pritchard v. Norton*, 106 U. S. 134, where Mr. Justice Miller said: "A contract valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing. *Leroux v. Brown*, 12 C. B. 801. But where the law of the forum and that of the place of the execution of the contract coincide it will be enforced, although required to be in writing by the law of the place of performance, as was the case of *Scudder v. Union Nat. Bank*, 91 U. S. 406, because the form of the contract is regulated by

the law of the place of its celebration and the evidence of it by that of the forum." Other courts have failed to notice this distinction. Thus in Pennsylvania it was laid down that a contract made in New Jersey where this statute was in force could not be enforced in Pennsylvania where no such statute existed. *Allshouse v. Ramsay*, 6 Wheat. 331. And this ruling is not without support in other ill-considered cases, decided on the mistaken assumption that the requirement of writing affects the validity of the contract. See *Dacosta v. Davis*, 24 N. J. L. 331; *Denny v. Williams*, 5 Allen, 1; *Low v. Andrews*, 1 Story, 38.

was made, but not in England, where the suit was brought, the action would have been sustained in England, though it could not have been in France.¹ Therefore it was correctly ruled in Missouri (construing the words in the 17th section of the statute to mean that the contract was void and not simply unenforceable)² that if the contract was valid in the State where it was made it might be sued on in Missouri, though the statute of that State declared that no such contract as that sued on "shall be allowed to be good."³

The necessity of a writing may be waived by the one sought to be bound.⁴ An action will not lie to recover the consideration paid upon an oral agreement for the purchase of lands, if the vendor is willing to fulfill.⁵ And an agreement executed on one part is not within the statute.⁶

Where a party to an agreement not in writing under the statute fails to execute it, the price advanced, or the value of articles delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. In such cases, the law raises, by implication, a promise to pay advances made upon the faith of the contract, and for which no consideration has been paid.⁷

But in several States⁸ it is provided by statute that such contracts "shall be void" and hence in those States the lack of a writing would go to the very existence of the contract.

§ 83. **Part Performance.**—And because a contract which does not fulfill the requirements of the statute is not

¹ *Downer v. Cheesebrough*, 38 Conn. 29; 4 Am. Rep. 29; *Scudder v. Union Nat. Bk.*, 91 U. S. 406.

² See post, § 90.

³ *Houghtaling v. Ball*, 20 Mo. 563.

⁴ *Montgomery v. Edwards*, 46 Vt. 151; 14 Am. Rep. 618; *Westfall v. Parsons*, 16 Barb. 645.

⁵ *Galway v. Shields*, 66 Mo. 313; 27 Am. Rep. 351; *Coughlin v. Knowles*, 7 Met. 57; 39 Am. Dec. 759.

⁶ *Noyes v. Moor*, 1 Root, 143; *Chit-*

tington v. Fowler, 2 Root, 387; *Cone v. Tracy*, 1 Root, 479; *Rogers v. Tracy*, 1 Root, 223; *Watrous v. Chalker*, 7 Conn. 224; *Pinney v. Pinney*, 2 Root, 191; *Washburn v. Dosch*, 68 Wis. 436; 60 Am. Rep. 873; *Suggett v. Cason*, 26 Mo. 221; *Frazer v. Gates*, 118 Ill. 99; *McQue v. Smith*, 9 Minn. 252; 86 Am. Dec. 100.

⁷ *Smith v. Smith*, 28 N. J. (L.) 208; 78 Am. Dec. 49.

⁸ Alabama, California, Michigan, Nevada, New York, Oregon and Wisconsin.

void, but merely unenforceable, Courts of Equity in some cases will enforce such contracts, and will dispense with the evidence required by the statute where one of the parties has, under certain conditions, performed his part of the contract.¹

5.

THE STATUTE OF FRAUDS, 17TH SECTION.

§ 84. **Introductory.**—By the seventeenth section of the English statute, “No contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum in writing of the same bargain be made and signed by the parties to be charged or their agents thereunto authorized.”

The same questions arise here as under the fourth section, viz.: (a) The kinds of contracts included in it; (b) the form required by the statute; (c) the effect of non-compliance with its provisions. In regard to (b) the form required where in the absence of a part acceptance and receipt or a part payment, a note or memorandum is necessary, the rules already stated as applicable to contracts under the fourth section apply also to contracts under the seventeenth section. And as to the other questions, the subject belonging more properly to a work on the law of Sales than to a work on Contracts, it will be sufficient to state briefly the general principles which apply.

(a) *What Contracts are Within the Statute.*

§ 85. “**Goods, Wares and Merchandise.**”—In England it is held that these words in the statute include only corporeal personal property, and therefore have no appli-

¹ See *post*, § 472; Specific Performance.

cation to contracts for the sale of shares of stock, accounts, choses in action and the like.¹ But in the United States this phrase embraces all objects of traffic and commerce in movable articles² and bonds, stocks and promissory notes are within the statute.³ And contracts for the produce or fruits of the soil are within this section of the statute, where they are *fructus industriales* or, being *fructus naturales*, are not to pass until severed from the soil. These as we have seen are not an "interest in land" within the fourth section, and are therefore, as chattels, within this section.⁴

It was the English law, until altered by another statute, that the statute did not apply to executory contracts of sale, *i. e.*, agreements for the future delivery of goods, but was restricted to executed contracts, *i. e.*, those in which the title passed at once or in which an immediate performance was intended. But the American courts have uniformly held that both executory and executed contracts of sale are within the statute.⁵ And the statute applies to all forms of sale, to auction sales as well as private sales.⁶

§ 86. **Contracts for Work and Labor.**—A contract for work and labor is not within the statute;⁷ but where one agrees to manufacture an article for another the courts have found it hard to determine whether the contract is for work, labor and material, or for goods, wares and merchandise, and three different doctrines are held at the present time.

¹ *Humble v. Mitchell*, 11 Ad. & Ell. 268.

² *Tisdale v. Harris*, 20 Pick. 2.

³ *Tisdale v. Harris*, *supra*; *Boardman v. Outter*, 128 Mass. 388; *Gooch v. Holmes*, 41 Me. 523; *Calvin v. Williams*, 3 H. & J. 38; 5 Am. Dec. 417; *Southern Ins. Co. v. Cole*, 4 Fla. 359; *North v. Forrest*, 15 Conn. 400.

⁴ See *ante*, § 73; *Lawson Rights*, Rem.

& Fr., § 2326. As to "fixtures," see *Tiedeman Sales*, § 59.

⁵ *Tiedeman Sales*, § 56.

⁶ *Id.*

⁷ *Phipps v. McFarlane*, 3 Minn. 109; 74 Am. Dec. 743; *Turner v. Mason*, 65 Mich. 662; *Grafton v. Armitage*, 2 C. B. 338; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55.

(a) In New York and Maryland an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the statute.¹

(b) In Massachusetts, and so large a number of other States, that it is stated by a writer on Sales to be the "prevalent American doctrine," a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, if the goods are to be manufactured specially for the purchaser, and upon his special order, and not for the general market, the contract is not within the statute.²

(c) The modern English doctrine dates from *Lee v. Griffin*,³ decided in 1861. In this case the action was on an oral contract for the manufacture by a dentist of a set of false teeth, and the defense was that it was within the statute of frauds and therefore unenforceable because not in writing. The plaintiff argued that it was a contract for work, labor and skill, and though some materials were furnished, they were unimportant and secondary. But the court held that it was a contract for the sale of goods, wares and merchandise and within the statute. The test adopted by the court was, *does the contract result in the sale of a chattel?* if so it is within the statute. And the rule

¹ Crookshank v. Burrell, 18 Johns. 58; 9 Am. Dec. 187; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sand. 1; Downs v. Ross, 23 Wend. 270; Eich-
elberger v. McCauley, 5 Har. & J. 213;
9 Am. Dec. 514; Parsons v. Goucks, 48
N. Y. 17; Deal v. Maxwell, 51 N. Y. 652.
See Goddard v. Benney, 115 Mass. 450;
15 Am. Rep. 115.

² Goddard v. Benney, 115 Mass. 450;
15 Am. Rep. 115; Spencer v. Cone, 1
Metc. 283; Mixer v. Howarth, 21 Pick.
205; 22 Am. Dec. 256; Lamb v. Crafts, 12
Metc. 353. See Tiedeman Sales, § 52.
Edwards v. Grand Trunk R. Co., 54 Me.
105; Sawyer v. Ware, 36 Ala. 675; New-
man v. Morris, 4 H. & McH. 421.

³ 1 B. & S. 272.

in *Lee v. Griffin*, has been adopted in a few cases in this country.¹

It is difficult to see the force of the distinction made in what we may call the New York and the Massachusetts doctrines. Why is it any less a sale because what is contracted for is not at the time in a condition to deliver, and why should it matter whether or not the thing ordered is or is not specially manufactured or something which the manufacturer is in the habit of making for the general public? Is not the real test after all, *what is the subject matter of the contract?* If it is a sale then it should be a "sale" within the statute; if it is an employment to work and labor then it is a contract for work and labor. And the intention is shown by simply considering what it is that the party intends to pay for. If I order a suit of clothes from a tailor, I do not intend to pay the tailor for his cloth and his labor in cutting out and making the garment; I intend to pay him for a suit of clothes and nothing else. And when my intention is to pay for the completed thing, it makes no difference that the labor is worth more than the materials. "The relative value of the labor and of the materials on which it is bestowed cannot be the test of what is the cause of action. If Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been none the less for the sale of a chattel." On the other hand if the materials are mine it is clear that it is not a sale. I take a piece of my own cloth to a tailor to have a garment made from it; here I intend to pay him for his work in making the garment; the contract cannot by any possibility be said to result in the sale of a chattel. Or I give a printer a manuscript to set up and print a book for me. Here the printer is to use his types, and print the book on paper to be supplied by him. Or I order an

¹ *Prescott v. Locke*, 51 N. H. 94; *Brooks v. Sanborn*, 21 Minn. 403.

attorney to draw me up a deed, he supplies the paper, pen and ink. But in neither case does the matter result in the sale of a chattel. I do not buy a printed book from the printer or a deed from the attorney. I pay them both for their services, and for the materials in addition if they are not impliedly included in the price for the service as in the case of the deed. The rule in *Lee v. Griffin* is simple, logical and easy of application and deserves a more extended recognition by the courts.

§ 87. *Value.*— Nearly all the States which have adopted this section follow the fifty dollars of the English statute, though in Maine, New Jersey, Missouri and Arkansas the limit is thirty dollars, in New Hampshire thirty-three dollars, in Vermont forty dollars, in California and Idaho two hundred dollars, and in Florida and Iowa there is no limit of value at all.¹ Where several articles are purchased at one time then if the combined value is over the statutory limit, the contract is within the statute although the value of no one article reached the statutory limit.² But if the purchase of each article was a separate transaction then the contract is not within the statute, unless the value of that article reached the statutory limit.³

(b) *Form Required by the Statute.*

§ 88. *Acceptance and Receipt.*— The statute excepts cases from its operation where “the buyer shall accept part of the goods so sold and actually receive the same.” The rule is that acceptance or receipt requires a delivery of and taking the possession as a matter of fact, to be decided by the court or jury upon the circumstances. “In order to satisfy the statute, there must be a delivery of the goods by the vendor with an intention of vesting the right

¹ Stimson Am. Stat. Law, 463.

² *Id.*; Tiedeman Sales, § 61.

³ *Balder v. Parker*, 2 B. & C. 37.

of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking the possession as owner."¹ Delivery alone, without acceptance and receipt, is not enough;² nor is receipt and acceptance, if the vendor did not intend to deliver the goods. Both parties must concur in the acts.³

Acceptance and receipt are not synonymous, the former being a mental operation through which the party determines to assume proprietorship over the goods, while the latter is the taking possession of them either by the party or his agent.⁴ There may be an acceptance without a receipt, as where the goods have been selected and approved by the buyer, but remain in the possession of the seller; and there may be a receipt without an acceptance, as where the goods are taken into his possession by the buyer for the purpose of examining them before he accepts them.⁵ But it is well settled that both acceptance and receipt is essential to take the case out of the statute.⁶ The receipt and acceptance need not be contemporaneous with the contract, but may be subsequently made;⁷ nor need they be concurrent with each other,—either may precede the other.⁸

¹ *Phillips v. Bistoll*, 2 B. & C. 517; *Snow v. Warner*, 10 Met. 133; 43 Am. Dec. 417; *Dean v. Tallman*, 105 Mass. 443; *Houghtaling v. Ball*, 19 Mo. 84; 59 Am. Dec. 331; *Hewes v. Jordan*, 39 Md. 472; 17 Am. Rep. 578; *Atwood v. Lucas*, 58 Me. 508; 89 Am. Dec. 713; *Boardman v. Spooner*, 13 Allen, 353; 90 Am. Dec. 196; *Jones v. Bank*, 29 Md. 287; 96 Am. Dec. 533; *Lay v. Neville*, 25 Cal. 545; *Hill v. McDonald*, 17 Wis. 97.

² *Maxwell v. Brown*, 30 Me. 98; 63 Am. Dec. 606; *Young v. Blaisdell*, 69 Me. 375; *Hartey v. St. Louis, etc., Assn.*, 39 Mo. 211; *Caulkins v. Hellman*, 47 N. Y. 449; 7 Am. Rep. 461; *Shepherd v. Pressey*, 33 N. H. 49; *Knight v. Mann*, 118 Mass. 145; *Scotten v. Sutler*, 37 Mich. 526; *Grey v. Cary*, 9 Daly, 363.

³ *Smith v. Hudson*, 6 Best & S. 431; *Brewster v. Taylor*, 7 Jones & S. 189;

Clarke v. Tucker, 2 Sand. 157; *Baker v. Ouyler*, 12 Barb. 667; *Young v. Blaisdell*, 60 Me. 274; *Matthiessen, etc., Co. v. McMahon*, 38 N. J. (L.) 536.

⁴ *Tiedeman Sales*, § 66.

⁵ *Tiedeman Sales*, § 66.

⁶ *Id.*

⁷ *Bush v. Holmes*, 53 Me. 417; *Boutwell v. O'Keefe*, 32 Barb. 434; *McKnight v. Dunlop*, 5 N. Y. 537; 55 Am. Dec. 370; *Davis v. Eastman*, 1 Allen, 422; *Marsh v. Hyde*, 3 Gray, 331; *Rickey v. Ten Brock*, 63 Mo. 563; *Gault v. Brown*, 48 N. H. 183; 2 Am. Rep. 210; *McCarthy v. Nash*, 14 Minn. 127; *Richardson v. Squires*, 37 Vt. 640; *Amson v. Dreber*, 35 Wis. 615.

⁸ *Garfield v. Paris*, 96 U. S. 536; *Pinkham v. Mattox*, 53 N. H. 604; *Knight v. Mann*, 118 Mass. 143.

If the buyer refuse to receive the goods, he cannot be held on his oral contract for purchase, and his reasons for refusing are not material.¹ The statute, of course, does not require a delivery of goods sold, where the contract is in writing, or there is a statutory memorandum of it,² or where the purchase-money, or part of it, is paid.³

§ 89. "Earnest or Part Payment."—The statute also excepts from its operation the cases in which "the buyer shall give something in earnest to bind the bargain, or in part payment." The word "earnest" as used in the statute has not received much attention from the courts. The meaning intended by the framers of the statute was probably the giving to the vendor a nominal sum, not a part of the price, as a token that the parties were in earnest or had made up their minds.⁴ But this method of binding the bargain has been rarely used, and in Massachusetts the word is held to mean a part payment of the price.⁵

The part payment must be something of value, though it need not be money.⁶ A promise to pay to the seller's creditor, accepted by the latter, who thereupon discharges the seller, is a part payment within the statute.⁷ But a mere promise to pay,⁸ or a tender of payment not accepted is not sufficient.⁹

In most of the States the part payment may be made at any time before the action is brought.¹⁰ But in New York a part payment will not take a contract out of the statute, unless the part payment is made at the time of making the

¹ Phillips v. Bistolli, 2 Barn. & C. 511; Tomkinson v. Staight, 17 Oom. B. 697; Nicholson v. Bower, 1 El. & E. 172; Knight v. Mann, 118 Mass. 145; Hewes v. Jordan, 39 Md. 480; 17 Am. Rep. 578.

² See ante, § 77.

³ Pierce v. Gibson, 2 Ind. 408; see post, § 89.

⁴ Rap. & L. Law Dict. 428.

⁵ Howe v. Hayward, 108 Mass. 54.

⁶ Combs v. Baleman, 10 Barb. 573; Hunter v. Wetzell, 17 Hun, 135; White

v. Drew, 56 How. Pr. 57; Dow v. Worthen, 37 Vt. 108.

⁷ Otterill v. Stevens, 10 Wis. 422; Tiedeman Sales, § 71.

⁸ Artcher v. Zeh, 5 Hill, 205.

⁹ Edgerton v. Hedge, 41 Vt. 676; Walrath v. Ingles, 64 Barb. 265; Hicks v. Cleveland, 48 N. Y. 84.

¹⁰ Thompson v. Alger, 12 Metc. 435; Davis v. Moore, 13 Me. 424; Gault v. Brown, 48 N. H. 180.

contract.¹ If it is made subsequently, it must be made and received for the express purpose of fulfilling the statute, or when made, the parties must substantially restate and reaffirm the terms of the contract.²

(c) *Effect of Non-compliance.*

§ 90. **Under this Section Contract Void.** — The words of the seventeenth section are not as in the fourth section that “no action shall be brought” on the agreement, but that it “shall not be allowed to be good.” In England the weight of recent opinion is in favor of holding that, notwithstanding the difference of language, the seventeenth section like the fourth³ is only a law of procedure and the contract is not void, but only unenforceable.⁴ In Missouri it has been expressly held that the words of the seventeenth section, unlike the fourth, relate to the existence of the contract,⁵ and that the agreement is void and not simply voidable seems to be the American rule.⁶

¹ *Allis v. Reed*, 45 N. Y. 142; *Blissell v. Balcom*, 40 Barb. 98. Reversed in part in 39 N. Y. 275.

² *Hunter v. Wetsell*, 57 N. Y. 375; 15 Am. Rep. 508; 84 N. Y. 549; 88 Am. Rep. 544.

³ See *ante*, § 82.

⁴ *Pollock Cont.* 4th Ed., p. 605. In *Lennox v. Brown*, 12 O. B. 809 (*ante*, § 82), it was assumed by the court that the words of section seventeen, unlike those of section four, go to the existence of the contract. But it has been intimated by Brett, L. J., in *Britain v. Rosster*, 11 Q. B. Div. 123, and by Lord Blackburn in the recent case of *Maddison v. Alderson*, 8 App. Cas. 479, that there is no difference in the effect of

the two sections. In *Bailey v. Sweeting*, 1 B. & S. 272, a letter admitting a purchase of goods was held to be a sufficient memorandum to satisfy the statute, which must mean that the requirements of the statute do not affect the validity of the contract but only the proof of it: for if the statute avoided a contract which did not satisfy its terms, a subsequent note or memorandum of a void transaction would be of no effect. But there is no direct decision on this point in England. *Anson Contr.* 67.

⁵ *Houghtaling v. Ball*, 20 Mo. 563.

⁶ *Alderton v. Buchoz*, 8 Mich. 322; *Head v. Goodwin*, 37 Me. 181; *Daniel v. Fraser*, 40 Miss. 507.

CHAPTER IV.

THE CONSIDERATION.

SECTION 91. Every simple contract requires a consideration.

92. What is a consideration.

93. Adequacy of consideration.

94. In equity.

95. Need not be money or money value.

96. Promise for a promise.

97. Mutuality required.

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99. Waiver of legal rights — Forbearance to sue.

100. Moral obligation.

101. Consideration must not be impossible.

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103. Promise to do what party bound to do.

104. Payment of part of debt.

105. Compositions with creditors.

106. Consideration must be legal.

107. Consideration is executory or executed.

108. Past consideration.

109. Consideration obtained by fraud.

110. Failure of consideration.

§ 91. Every Simple Contract Requires a Consideration. — To the validity of every simple contract a consideration is necessary, and it makes no difference that the contract is in writing and not merely by word of mouth.¹ In an early case in England² Chief Justice Mansfield had intimated that, among merchants, a promise put in writing was binding without a consideration, the view being that

¹ Crawford's Appeal, 61 Pa. St. 52; 100 Am. Dec. 609; Cook v. Bradley, 7 Conn. 57; 18 Am. Dec. 79; People v. Shall, 9 Cow. 778; Burnett v. Bisco, 4 Johns. 235; Thacher v. Dinsmore, 5 Mass. 301; Brown v. Adams, 1 Stew. 51;

18 Am. Dec. 38; Beverleys v. Holmes, 4 Munf. 95; Clark v. Small, 6 Yerg. 418; Roper v. Stone, Cooke, 497; Perrine v. Cheeseman, 11 N. J. (L.) 174; 19 Am. Dec. 338; Mosby v. Leeds, 3 Call. 439.

² Pillans v. Van Mierop, 3 Burr. 1663.

the presence of consideration was one mode only for supplying evidence of the intention of the parties to form a contract, and that if the terms of the contract were reduced to writing either by commercial custom or statutory enactment such evidence was sufficient without consideration. But this view of the law was declared to be incorrect in the leading case of *Rann v. Hughes*,¹ decided in 1765. In this case an administratrix had promised in writing to answer damages out of her own estate. There was no consideration for the promise but it was contended that the writing required by the statute of frauds² rendered a consideration unnecessary. But the highest tribunal in England said: "It is undoubtedly true that every man is, by the law of nature, bound to fulfill his engagements. It is equally true *that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration.* Such agreement is 'nudum pactum ex quo non oritur actio;' and whatever may be the sense of this maxim in the civil law, it is in the last sense only that it is to be understood in our law. * * * All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. *If they be merely written and not specialties, they are parol and a consideration must be proved.*"

No principle is better settled in the courts of the United States than the principle thus laid down in *Rann v. Hughes*. Therefore a promise made without a consideration is a gratuitous promise and not binding on the promisor,³ and it

¹ 7 T. R. 350.

² See *ante*, § 70.

³ *Mills Co. Bk. v. Perry*, 73 Ia. 15; 2 Am. St. Rep. 228; *Bolles v. Coull*, 12 Minn. 113; *Michaad v. Lagarde*, 4 Minn. 48; *Pomeroy v. Slade*, 16 Vt. 220; *Whitehill v. Wilson*, 3 Penr. & W. 405; 24 Am. Dec. 326; *Carson v. Clark*, 1 Scam.

118; 25 Am. Dec. 79; *Smith v. Rankin*, 4 Yerg. 1; 26 Am. Dec. 213; *Jones v. Hollday*, 11 Tex. 412; 63 Am. Dec. 467; *Willson v. Baptist Soc.*, 10 Barb. 308; *Read v. Vanarsdale*, 2 Leigh, 567; *Ashe v. De Rosset*, 8 Jones, 240; *Richardson v. Williams*, 49 Me. 558.

makes no difference that the party to whom it was made has sustained damage by relying upon it.¹ The consideration for a written contract need not appear upon its face, but may be proved by parol, or inferred from the terms of the agreement.²

Without being exceptions to the rule, there are three cases in which a consideration is not required: (1) Contracts under seal. But these as we have seen are not simple but formal contracts.³ (2) Bills of exchange and promissory notes are an apparent but not a real exception to the rule. Here consideration is presumed to exist and need not be proved by the plaintiff, and the burden of proof rests on the party disputing the validity of the contract. If, however, he can show that, as between himself and the party suing, no consideration was given for the making or indorsement of the bill or note, the promise fails, as it would do in any other case of simple contract under like circumstances.⁴ (3) In several States⁵ by statute a written instrument is presumed to be founded on a consideration, thus placing all writings on a level with negotiable instruments.

§ 92. What is a Consideration. — A consideration which will support a simple contract is, *some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.*"⁶ It is not necessary that a benefit should

¹ As where A and B were joint owners of a vessel, and A voluntarily undertook to get her insured, but neglected so to do, and the vessel was lost, it was held that B could not sustain an action against A for breach of promise. *Thorne v. Deas*, 4 Johns. 84.

² *Attix v. Pelan*, 5 Iowa, 336; *Tingley v. Cutler*, 7 Conn. 291; *Mouton v. Noble*, 1 La. Ann. 192; *Cummings v. Dennett*, 28 Me. 297; *Patchin v. Swift*, 21 Vt. 202; *Thompson v. Blanchard*, 3 N. Y. 335.

³ See *ante*, § 61.

⁴ *Conline v. R. R. Co.*, 3 Houst. 288; 89 Am. Dec. 230.

⁵ California, Iowa, Indiana, Kansas, Kentucky and Missouri.

⁶ *Hammond v. Hussey*, 51 N. H. 40; 12 Am. Rep. 41; *Weld v. Nichols*, 17 Pick. 538; *Smucker v. Lawrence*, 21 Ill. 267; *Weston v. Hight*, 18 Me. 281; *Leach v. Keach*, 7 Ia. 232; *Devecmon v. Shaw*, 69 Md. 109; 9 Am. St. Rep. 423; *Fisher v. Bartlett*, 8 Me. 123; 23 Am. Dec. 225; *Hind v. Holdship*, 2 Watts, 104; 26 Am. Dec. 107; *Chick v. Trevett*, 20 Me. 462; 37 Am. Dec. 68; *Reddick v. Jones*, 6 Ired. 107; 44 Am. Dec. 68; *Holt v. Robinson*, 21 Ala. 106; 56 Am. Dec. 240; *Tompkins v. Phillips*, 12 Ga. 53;

accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.¹ In England the consideration must move from the plaintiff, and a third party has no right to sue upon a contract because he has an interest in its performance.² But the prevailing rule in this country is that if one person, for a valid consideration, makes a parol promise to another for the benefit of a third person, the third person may maintain an action on the promise.³

Molyneux v. Collier, 17 Ga. 46; *Doyle v. Knapp*, 4 Ill. 334; *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Doyle v. Dixon*, 97 Mass. 206; 93 Am. Dec. 80; *Bank of Hanover v. Bridgers*, 98 N. C. 67; 2 Am. St. Rep. 317; Alabama, etc., *R. R. Co. v. R. R. Co.*, 84 Ala. 570; 5 Am. St. Rep. 401; *Dickerson v. Ripley Co.*, 6 Ind. 123; 63 Am. Dec. 373; *Cobb v. Cowdery*, 40 Vt. 35; 94 Am. Dec. 370. In strictness consideration is of two kinds, viz.: *good* and *valuable*. Good consideration is that of blood or natural affection, as where a man makes a grant to a near relation, being founded on motives of duty or generosity 2 Bla. Com. 297. A promise founded on a "good" consideration is a gratuitous one. *Keefer v. Grayson*, 76 Va. 517; 44 Am. Rep. 171; *Kennedy v. Ware*, 1 Pa. St. 445; 44 Am. Dec. 145; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Priester v. Priester*, Rich. Eq. Cas. 26; 13 Am. Dec. 191; *Holley v. Adams*, 16 Vt. 206; 42 Am. Dec. 508. Deeds made upon good consideration only are considered as merely voluntary; and although they may be valid at law between the parties, are not aided in equity; and they are liable to be held void as against creditors and purchasers for value. *Lawson Rights, Rem. & Pr.*, § 2248. A valuable consideration is the consideration defined above. Practically the verbal distinction is not recognized and when the courts speak of a contract being founded on a "good" consideration, they mean a "valuable" one. Marriage

is a valuable consideration. *Chichester v. Vass*, 1 Munt. 98; 4 Am. Dec. 531; *Dugan v. Gittings*, 3 Gill, 138; 43 Am. Dec. 306; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; *Rockafellow v. Newcomb*, 57 Ill. 191; *Magniac v. Thompson*, 7 Pet. 333; *Wright v. Wright*, 54 N. Y. 440; *Peck v. Vandemark*, 99 N. Y. 35; *Frank's Appeal*, 59 Pa. St. 194; *Wood v. Jackson*, 8 Wend. 9; 23 Am. Dec. 603; *Gorman v. Cromartie*, 11 Ired. 174; 53 Am. Dec. 406; *Wall v. Scales*, 1 Dev. Eq. 472; *Scott v. Osborne*, 2 Murf. 413; *Barr v. Hill*, Add. Ecc. 276. See *Raymond v. Sellick*, 10 Conn. 490.

¹ *Hamar v. Sidney*, 124 N. Y. 538; 21 Am. St. Rep. 698; *Brown v. Ray*, 10 Ired. 72; 41 Am. Dec. 379; *Jones v. Ashburner*, 4 East, 463; *Hilton v. Southwick*, 17 Me. 303; 85 Am. Dec. 233; *Carr v. Card*, 34 Mo. 513; *Underhill v. Gibson*, 2 N. H. 352; 9 Am. Dec. 82; *Powell v. Brown*, 3 Johns. 100; *Forster v. Fuller*, 6 Mass. 58; 4 Am. Dec. 87; *Townsend v. Sumrall*, 2 Pet. 182; *Lent v. Padelford*, 10 Mass. 220; 6 Am. Dec. 119; *Seaman v. Seaman*, 13 Wend. 381; *Watkins v. James*, 5 Jones, 105; *Dorwin v. Smith*, 35 Vt. 69; *Dyer v. McPhee*, 6 Col. 174; *Pitt v. Gentle*, 49 Mo. 74; *New Hanover Bank v. Bridgers*, 98 N. C. 57; 2 Am. St. Rep. 317.

² *Anson Contr.* 79.

³ *Bristow v. Lane*, 21 Ill. 194, 197; *Lawrence v. Fox*, 20 N. Y. 268; *Hendrick v. Lindsay*, 93 U. S. 143; see *post*, § 113; *Parties*.

§ 93. **Adequacy of Consideration.** — Whether or not the consideration is adequate to the promise is immaterial. So long as the party gets what he contracted for, the courts will not examine into the transaction in order to find out what its value is to him or whether it is at all proportionate to what he promised in return. They will not ask nor will they permit the promisor to litigate the question whether the consideration benefits him or a third person or is of any substantial value to any one.¹ To do otherwise it is well said would be “the law making the bargain, instead of leaving the parties to make it.”² The slightest consideration then is sufficient to support the most onerous obligation,³ and it is enough that something is promised, done, forborne or suffered by the party to whom the promise is made.⁴

In the well known case of *Bainbridge v. Firmstone*,⁵ F asked permission of B to weigh his boilers, which B granted, and in consideration of which F promised to return them in as good condition as he received them. He did not do so and B sued him. F contended that the permission to weigh the boilers was neither detriment to B nor benefit to F, and was therefore not a consideration to support his promise. But the court said: “The defendant had some reason for wishing to weigh the boilers; and he could only do so by obtaining permission from the plaintiff, which permission he did obtain by promising to return them in good condition. We need not inquire what benefit

¹ *Davis v. Steiner*, 14 Pa. St. 275; 53 Am. Dec. 547; *Lawrence v. McCalmont*; 2 How. 426; *Hind v. Holdship*, 2 Watts, 104; 26 Am. Dec. 107; *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *Goodspeed v. Fuller*, 46 Me. 141; 71 Am. Dec. 573; *Glvan v. Swadley*, 3 Ind. 484; *Bryan v. Dyer*, 28 Ill. 188; *Shepard v. Rhodes*, 7 R. I. 470; 84 Am. Dec. 573; *Hubbard v. Coolidge*, 1 Metc. 93; *Earl v. Peck*, 64 N. Y. 596; *Eyre v. Potter*, 15 How. 42; *Cates v. Bates*, 78 Ind. 285;

Mound City Co. v. Slauson, 65 Cal. 426; *Hall, etc., Co. v. American, etc., Co.*, 48 Mich. 331.

² *Pilkington v. Scott*, 15 M. & W. 660.

³ *Darrow v. Walker*, 48 N. Y. S. C. 6.

⁴ *Nash v. Lull*, 102 Mass. 60; *Worth v. Case*, 42 N. Y. 302; *Lawrence v. McCalmont*, 2 How. 426; *Harlan v. Harlan*, 20 Pa. St. 305; *Berry v. Graddy*, 1 Met. (Ky.) 553; and cases cited in previous notes.

⁵ 8 Ad. & Ell. 743.

he expected to derive. The plaintiff might have given or refused permission." In another case the defendant promised the plaintiffs that if they would return him a written guaranty which they had of his he would pay certain bills. The plaintiffs did so, but it was afterwards discovered that the guaranty was not legally enforceable against the defendant at all, and was worth no more than a piece of paper; and it was argued that it was therefore no consideration for the defendant's promise. "The plaintiffs," said the court, "were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded; he may have had other motives and objects, and of their weight he was the only judge."¹

But the rule as to inadequacy of consideration does not apply to a mere exchange of sums of money, whose value is exactly fixed. Thus in *Schnell v. Nell*,² it was held that the consideration of one cent would not support a promise to pay \$600. "It is true," said the court, "that as a general proposition inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value for money, or perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an

¹ *Haigh v. Brooks*, 10 Ad. & Ell. 309; and to the same effect *Churchill v. Bradley*, 58 Vt. 403; 56 Am. Rep. 563.

² 17 Ind. 29; 79 Am. Dec. 453.

indeterminate value, extrinsic from its simple money value, a different view might be taken; as it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush, upon its face, if it be regarded as an earnest one. The consideration of one cent is plainly, in this case, merely nominal, and intended to be so."

In contracts in restraint of trade it was at one time thought that the court would inquire into the adequacy of the consideration, but it is now well settled that these do not differ from other kinds of contracts in this respect.¹

§ 94. *In Equity*.— Mere inadequacy of consideration is not even in equity a sufficient ground for resisting the specific performance of a contract.² But courts of equity will take in account in cases which come before them the inadequacy of the consideration, and if a contract is sought to be avoided on the ground of fraud or undue influence, it will be regarded as corroborative evidence thereof.³

§ 95. *Need Not be Money or Money Value*.— Though it is frequently stated that a legal consideration must be something of a money value or something capable of being reduced to a money value,⁴ it is submitted that consideration in law has not necessarily anything to do with money or money values. If A promise B to pay him five dollars if he will not eat a dinner or not wear his best coat for a day, is not the consideration of B's abstaining sufficient to

¹ *Guerand v. Dandeleit*, 32 Md. 561; 3 Am. Rep. 184; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *Lawrence v. Kidder*, 10 Barb. 649; *McClungs' Appeal*, 58 Pa. St. 51; *Hubbard v. Miller*, 27 Mich. 15; *Linn v. Sigsbee*, 67 Ill. 75; *Grasselli v. Lowden*, 11 Ohio St. 249.

² *Lawson Rights, Rem. & Pr.*, § 2247; *post*, 276.

³ *Gifford v. Thorn*, 9 N. J. (Eq.) 702; *Cruise v. Christopher*, 5 Dana, 181; *Feigley v. Feigley*, 7 Md. 537; 61 Am. Dec. 375; *Beard v. Campbell*, 2 A. K. Marsh, 125; 12 Am. Dec. 382; *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81; *Cole v. Trecothick*, 9 Vesey, 246; *Borell v. Dann*, 2 Hare, 450.

⁴ See *Bishop Contr.* § 41.

support A's promise? But is not eating a dinner or not wearing a certain coat capable of being reduced to a money value? Money value is, of course, a valuable consideration but it is clear as we have seen that it is not absolutely necessary, but may be and frequently is the doing or promising to do, something not illegal, at the request of the promisor, which you are not already under a legal obligation to do. Thus in the late case of *Hamer v. Sidway*,¹ an uncle promised a nephew that if he would refrain from drinking liquor, using tobacco, swearing and playing certain games for money until he came of age, he would pay him \$5,000. The nephew kept his side of the bargain, but when sued for the money the uncle claimed that the agreement was not founded on a valid consideration. But the court said: "It is sufficient that he restricted his lawful freedom of action within certain limits upon the faith of his uncle's agreement."

§ 96. **Promise for a Promise.** — The consideration for a promise may be a promise, and the consideration is then said to be executory; the obligations which are created vest equally in both parties, each is bound to the performance of some future act.² For example A and B agree to marry, the consideration for A's promise is B's promise and *vice versa*. Another illustration of mutual promises is the case of voluntary subscriptions, to promote some improvement in which the subscribers have a common interest.

¹ 124 N. Y. 523; 21 Am. St. Rep. 633; and see *Talbott v. Stemmons*, Ky. 1889; *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 305.

² *Appleton v. Chase*, 19 Me. 74; *Byrd v. Fox*, 8 Mo. 574; *Society in Troy v. Perry*, 6 N. H. 164; *George v. Harris*, 4 N. H. 553; 17 Am. Dec. 446; *Commissioners v. Perry*, 5 Ohio, 58; *White v. Denielt*, 2 Hall, 405; *Briggs v. Lizer*, 30 N. Y. 647; *Forney v. Shipp*, 4 Jones, 527; *Nott v. Johnson*, 7 Ohio St. 270; *Howe v. O'Mally*,

1 *Murph.* 287; 3 Am. Dec. 693; *Babcock v. Wilson*, 17 Me. 372; 35 Am. Dec. 263; *James v. Fulcro*, 5 Tex. 512; 55 Am. Dec. 743; *Davis v. Calloway*, 30 Ind. 112; 95 Am. Dec. 671; *Funk v. Hough*, 29 Ill. 145; *Downey v. Hinchman*, 25 Ind. 453; *Nunnally v. White*, 3 Met. 584; *Whitehead v. Potter*, 4 Ired. 257; *Philpot v. Granger*, 14 Wall. 570; *Cooke v. Murphy*, 70 Ill. 96; *Thayer v. Allison*, 109 Ill. 180; *Coleman v. Eyre*, 45 N. Y. 88.

The promises are binding, because each is made in reliance upon the others.¹

§ 97. **Mutuality Required.** — Where an executory contract consists of mutual promises, both parties must be bound or it will be void for want of mutuality² and will not sustain an action by either to recover for its breach.³ For example, if A promises to deliver to B such goods as he may require at a certain price, and B accepts that offer, when B calls on A to supply the goods on the terms fixed, A may refuse because as there was no engagement on the part of B to take any at all, there was no mutuality and no contract.⁴ But a promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee.⁵ And where M, the proprietor of a number of large hotels in New Orleans, promised to take and pay for all the ice he might require for the use of his hotels, and S promised to furnish the ice so required at a certain

¹ *Lathrop v. Knapp*, 27 Wis. 214; *Higert v. Indiana Univ.*, 53 Ind. 829; *Ohio Wesleyan Female College v. Love*, 16 Ohio, 20; *Johnson v. Ollerwein University*, 41 Ohio St. 527; *Whitsett v. Pre-emption Pres. Church*, 110 Ill. 125; *Pryor v. Cain*, 25 Ill. 292; *McClure v. Wilson*, 43 Ill. 361; *Underwood v. Waldron*, 12 Mich. 78; *Conrad v. La Rue*, 52 Mich. 86; *Culver v. Banning*, 19 Minn. 309; *Barnes v. Perine*, 12 N. Y. 18; *Trustees Troy. Conf. Academy v. Nelson*, 24 Vt. 189; *Christian College v. Hendley*, 49 Cal. 347; *Nathan v. Janner*, 5 Harr. 346; *McDonald v. Gray*, 11 Ia. 518; 79 Am. Dec. 79; *Comstock v. Howd*, 15 Mich. 237; *State Treasurer v. Cross*, 9 Vt. 289; 31 Am. Dec. 626; *Trustees v. Ripley*, 6 Me. 442; *Williams College v. Danforth*, 12 Pick. 541; *Doyle v. Glasscock*, 24 Tex. 200.

² *Railroad Co. v. Dane*, 43 N. Y. 240; *Chambliss v. Smith*, 30 Ala. 366; *Smith v. Weaver*, 70 Ill. 372; *Hickman v. Glazebrook*, 18 Ind. 210; *Hill v. Roderick*, 4 W. & S. 221; *Wood v. Edwards*, 19 Johns. 208; *Bailey v. Armstrong*, 19 Minn. 535.

³ *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103; *King v. Warfield*, 67 Md. 246; *Ennis v. Gordon*, 49 N. H. 444; *Keep v. Goodrich*, 12 Johns. 397; *Lam-oreaux v. Gould*, 3 Seld. 349; *Dressel v. Jordan*, 104 Mass. 412; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Wilkinson v. Heavenrich*, 58 Mich. 576.

⁴ *Campbell v. Lambert*, 36 La. Ann. 25; 51 Am. Rep. 1. The rule is different in England. *Great North. R. Co. v. Witham*, L. R. 9 C. P. 16. And mutual promises, to be obligatory, must be simultaneous; it will not be sufficient if alleged to be made at different times on the same day. *Livingston v. Rogers*, 1 Calnes, 583; *Keep v. Goodrich*, 12 Johns. 397; *Tucker v. Woods*, 12 Johns. 190; 7 Am. Dec. 305; *James v. Fulcrold*, 5 Tex. 512; 55 Am. Dec. 743; *Wythman v. Crates*, 15 Mass. 1; *Buckingham v. Ludlum*, 40 N. J. (Eq.) 423; *Missouri Bank v. Sabin*, 48 Vt. 239.

⁵ *Willits v. Sun Mut. Ins. Co.*, 45 N. Y. 45; 6 Am. Rep. 31.

price, it was held, that the contract was not invalid for want of mutuality, as M could not dispense entirely with the use of ice in his hotels.¹

§ 98. **Promise May be Conditional.** — The promise may be conditional upon the happening or non-happening of some future event, as where A agrees to pay for work in a building provided it is certified to as being properly done by an architect, or where B agrees to pay for the use of a store his liability to cease if the store is destroyed by fire. In the one case the promise depends for its fulfillment upon a condition precedent, in the other it is liable to be defeated by a condition subsequent, but in neither case does its contingent or conditional character prevent it from forming a good consideration for promises given in return.²

§ 99. **Waiver of legal right — Forbearance to sue.** — The abandonment of a right, or a promise to forbear from exercising it, is good consideration for a promise,³ as for example forbearance of legal proceedings by a person entitled to sue;⁴ or the extension of time for the payment of a debt or the performance of a promise.⁵ The right may be *legal*

¹ *Smith v. Morse*, 20 La. Ann. 220.

² *Anson Contr.* 74. See *post*; *Performance of Contract*.

³ *Ashburn v. Gibson*, 9 Port. 549; *Thompson v. Nelson*, 28 Ind. 431; *Abshire v. Mather*, 27 Ind. 381; *Clark v. McFarland*, 5 Dana, 45; *Coleman v. Frum*, 4 Ill. 378; *Sanford v. Huxford*, 32 Mich. 313; 20 Am. Rep. 647; *Vogel v. Meyer*, 23 Mo. (App.) 427; *Vinal v. Richardson*, 13 Allen. 521.

⁴ *Smith v. Weed*, 20 Wend. 184; 32 Am. Dec. 525; *Stern v. Drinker*, 2 E. D. Smith, 403; *Hockenbury v. Meyers*, 34 N. J. (L.) 346; *Tuttle v. Bigelow*, 1 Root, 106; 1 Am. Dec. 35; *Hamaker v. Eberley*, 2 Binu. 568; 4 Am. Dec. 477; *Sage v. Wilcox*, 6 Conn. 81; *Silvis v. Ely*, 8 Watts & S. 420; *Robinson v. Gould*, 11 Cush. 55; *Vinal v. Richardson*, 13 Allen, 521; *Abbott v. Fisher*, 124 Mass. 411;

Rood v. Jones, 1 Doug. 188; *Martin v. Black*, 20 Ala. 309; *Calkins v. Chandler*, 36 Mich. 320; 24 Am. Rep. 593; *Sanford v. Huxford*, 32 Mich. 313; 20 Am. Rep. 647; *Newton v. Carson*, 80 Ky. 309; *Ford v. Rehman*, Wright, 434; *Miller v. Hawker*, 66 Ill. 185; *Snell v. Bray*, 56 Wis. 156; *Scott v. Warner*, 3 Lans. 49; *Beadle v. Whillock*, 64 Barb. 287; *Spangle v. Springer*, 23 Pa. St. 454; *Keeler v. Salisbury*, 27 Barb. 485; *Collins v. Barnes*, 83 Pa. St. 15.

⁵ *Brainard v. Harris*, 14 Ohio, 107; 45 Am. Dec. 525; *Hancock v. Hodgson*, 4 Ill. 329; *Underwood v. Hossack*, 38 Ill. 208; *Raymond v. Smith*, 5 Conn. 553; *Leamester v. Burckhart*, 2 Bibb, 25; *Boyd v. Freize*, 5 Gray, 533; *Lowe v. Weatherly*, 4 Dev. & B. 212; *Ford v. Rehman*, Wright, 434; *Bank of Muskegon v. Carpenter*, Wright, 729;

or equitable,¹ certain or doubtful,² it may exist against the promisor, or against a third party;³ but it must at least be doubtful; forbearance to enforce an unenforceable claim can be no consideration for a promise.⁴

A common form in which a forbearance appears as consideration for a promise is in the compromise of an action, and it is well settled that giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise.⁵ It is said in some of the cases that the claim must be at least doubtful, "a *bona fide* claim under color of right."⁶ But this test is not usually insisted upon, especially in cases of compromise after suit brought. A discontinuance of the suit, commenced in

Nicholson v. May, Wright, 669; Silvia v. Ely, 3 Watts & S. 429; Watson v. Randall, 20 Wend. 201; Clark v. Russell, 3 Watts, 213; 27 Am. Dec. 348. Sidwell v. Evans, 1 Pa. 385; 21 Am. Dec. 337; Hamaker v. Eberley, 2 Binn. 506; 4 Am. Dec. 477; Allen v. Morgan, 5 Humph. 624; Templeton v. Bascom, 33 Vt. 132; Hill v. Smith, 34 Vt. 585.

¹ Noblet v. Green, 2 Dev. 517; 21 Am. Dec. 347.

² Byrne v. Cummings, 41 Miss. 192; Cook v. Wright, 1 B. & S. 559.

³ Jennison v. Stafford, 1 Cush. 168; 48 Am. Dec. 594; Cook v. Duval, 9 Gill, 467; Brice v. Clark, 8 Pa. St. 301; Gilles v. Ackler, 9 Pa. St. 147; 49 Am. Dec. 551.

⁴ Palfrey v. R. R. Co., 4 Allen, 55; Sidwell v. Evans, 1 P. & W. 383; Martin v. Black, 20 Ala. 309; Hew Hamp. Sav. Inst. v. Colcord, 15 N. H. 119; Newell v. Fisher, 11 S. & M. 431; 49 Am. Dec. 66; Oregon, etc., R. Co. v. Potter, 5 Oregon, 228; Cline v. Templeton, 78 Ky. 530; Silvernall v. Cole, 12 Barb. 680; Sharp v. Rogers, 12 Minn. 174; Prater v. Muller, 25 Ala. 321; Smith v. Easton, 54 Md. 138; Hunt v. Johnson, 23 Mo. 432; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Dawson v. Ford, 23 W. Va. 617; Everingham v. Meighan, 55 Wis. 354. Forbearance alone without a promise is

not sufficient. Manter v. Churchill, 127 Mass. 31; Brownell v. Harsh, 29 Ohio St. 631.

⁵ Adams v. Wilson, 12 Metc. 138; 45 Am. Dec. 240; Weed v. Terry, 2 Doug. (Mich.) 344; 45 A. D. 237; Pierce v. N. O. Building Co., 9 La. 397; 29 Am. Dec. 448; Crans v. Hunter, 28 N. Y. 394; Flannagan v. Kilcome, 58 N. H. 443; VanDyke v. Davis, 2 Mich. 145; Gates v. Shults, 7 Mich. 126; Parker v. Enslow, 102 Ill. 277; Wehrum v. Kuhn, 61 N. Y. 623; McKinley v. Watkins, 13 Ill. 140; Clark v. Turnbull, 47 N. J. (L.) 265; Bellows v. Sowles, 35 Vt. 391; Honeyman v. Jarvis, 79 Ill. 318; Parker v. Enslow, 102 Ill. 272; Barlow v. Ins. Co., 4 Met. 270; Kerr v. Lucas, 1 Allen, 279, 280; Feeter v. Weber, 78 N. Y. 334; Union Bank v. Geary, 5 Pet. 99; Northern, etc., Co. v. Kelly, 118 U. S. 199. Swem v. Green, 9 Col. 358.

⁶ Mulholland v. Bartlett, 74 Ill. 62; Ware v. Morgan, 67 Ala. 461; Eckel v. McAllister, 54 Md. 373; Logan v. Matthews, 6 Pa. St. 417; Gates v. Shults, 7 Mich. 126; Prater v. Miller, 25 Ala. 320; 60 Am. Dec. 621; White v. Hoyt, 73 N. Y. 505; Ormsbee v. Howe, 54 Vt. 182; Bellows v. Sowles, 35 Vt. 391; 45 Am. Rep. 621; Headley v. Hackley, 50 Mich. 48.

good faith, is a sufficient consideration without regard to the validity of the claim in suit.¹ The true doctrine is thus stated by COCKBURN, C. J.:² "If a man *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action he escapes from the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it: in that case his consent would be fraudulent."³ It has been held that a promise of forbearance for an unspecified time was no consideration.⁴ But it may now be regarded as settled that a promise of forbearance, in order to form a consideration, need not be a promise of *absolute forbearance*, nor even of forbearance for a *definite time*; where no time is mentioned, a reasonable time will be implied.⁵

§ 100. **Moral Obligation.**—A promise made under a sense of moral obligation either of benefits received or of duties of honor, conscience or friendship, is not made upon a sufficient consideration, and is not binding.⁶ Thus where

¹ Jones v. Eittenhaur, 87 Ind. 348; Flannagan v. Kilcome, 58 N. H. 443; Bellows v. Sowles, 35 Vt. 391; 45 Am. Rep. 621.

² Callisher v. Bischoffsheim, L. R. 5 Q.B. 449.

³ Long v. Towl, 42 Mo. 545; 97 Am. Dec. 355; Pitkin v. Noyes, 48 N. H. 294; 97 Am. Dec. 615.

⁴ Clark v. Russel, 3 Watts, 213; 27 Am. Dec. 348; Garnett v. Kirkham, 33 Mass. 389.

⁵ Sidwell v. Evans, 1 P. & W. 383; 31 Am. Dec. 387; Howe v. Taggart, 133 Mass. 284; King v. Upton, 4 Me. 387; Rood v. Jones, 1 Doug. (Mich.) 188; Downing v. Funk, 5 Rawle, 69; Elting v. Vanderlyn, 4 Johns. 237; Bowen v.

Tipton, 64 Md. 275; Oldershaw v. King, 2 H. & N. 517; Crears v. Hunter, 19 Q. B. D. 341; Calkins v. Chandler, 38 Mich. 320; Boyd v. Freize, 5 Gray, 553; Underwood v. Hossack, 38 Ill. 208; Worcester Nat. Bank v. Cheney, 87 Ill. 602.

⁶ Mills v. Wyman, 3 Pick. 206; Eastwood v. Kenyon, 11 Ad. & El. 438; Shepard v. Rhodes, 7 R. I. 470; 84 Am. Dec. 573; Cobb v. Cowdry, 40 Vt. 25; 94 Am. Dec. 570; Updike v. Titus, 18 N. J. Eq. 151; Valentine v. Foster, 1 Met. 520; 35 Am. Dec. 377; Schnell v. Nell, 17 Ind. 29; 79 Am. Dec. 453; Porterfield v. Butler, 47 Miss. 165; 12 Am. Rep. 329; Geer v. Archer, 2 Barb. 420. Loomis v. Newhall, 15 Pick. 159; Ehle v. Judson, 24 Wend. 97; Schroeder v. Fink, 60 Md. 436; Tur-

services are rendered to one person by another without his knowledge or request, or without any expectation of receiving compensation for them, a subsequent promise to pay for them is without consideration.¹ In *Strauss v. Harrison*² a mortgage of a homestead being void because the wife's acknowledgment was defective, the husband's agreement, after default, to pay rent to the mortgagee was held without consideration. So the promise by a son to pay his father's debts,³ or by a father to pay his son's,⁴ or the promise of an executor based on what he knew to be the desire of the testator,⁵ or the promise of a husband to carry out what he believed to be the wishes of his deceased wife,⁶ or the promise of a man to a woman whom he had seduced to pay her a certain sum of money in atonement for the injury,⁷ are without consideration and unenforceable. Any other rule, it is said, "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."⁸

Promises to pay debts barred by some law not affecting the real right, as debts barred by the statute of limitations, debts incurred by infants, debts of bankruptcy, are sometimes classed as exceptions to the above rule. But they properly fall under the head of past consideration.⁹

lington v. Slaughter, 54 Ala. 195; *Gordon v. Gordon*, 56 N. H. 170; *Philpot v. Gruninger*, 14 Wall. 570; *Farnham v. O'Brien*, 22 Me. 475; *McElven v. Sloan*, 56 Ga. 208; *Gay v. Botts*, 18 Bush. 299; *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 408; *Dodge v. Adams*, 19 Pick. 429. In a few early cases such considerations were recognized. *Howley v. Farrer*, 1 Vt. 178; *Glass v. Beach*, 5 Vt. 178; *Clark v. Herring*, 5 Binney, 33; *Kilborn v. Bradley*, 3 Day, 356; 3 Am. Dec. 273; *Fairchild v. Bell*, 2 Brev. 129; 3 Am. Dec. 702; *Cardwell v. Strother*, Litt. Sel. Cas. 429; 12 Am. Dec. 326; *Scott v. Caruth*, 9 Yerg. 418; *Bentley v. Morse*, 14 Johns. 468.

¹ *Allen v. Bryson*, 67 Ia. 591; 56 Am. Rep. 358; *Oster v. Hobbs*, 33 Ark. 215;

Bartholomew v. Jackson, 20 Johns. 28 11 Am. Dec. 237.

² 79 Ala. 324.

³ *McElven v. Sloan*, 56 Ga. 208; *Crab v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79; *Nixon v. VanHeze*, 5 N. J. (L.) 491; 8 Am. Dec. 619.

⁴ *Freeman v. Robinson*, 38 N. J. (L.) 383; 20 Am. Rep. 339; *Mills v. Wyman*, 3 Pick. 207.

⁵ *Thomas v. Thomas*, 2 Q. B. 581; *Pattison, J.*

⁶ *Schnell v. Niel*, 17 Ind. 29; 79 Am. Dec. 453.

⁷ *Beaumont v. Reeve*, 8 Q. B. 483.

⁸ *Eastwood v. Kenyon*, 11 Ad. & E. 438.

⁹ See post, §108.

§ 101. **Consideration Must Not be Impossible.** — A promise is not enforceable where it is to do a thing so obviously impossible that it can form no real consideration. This may occur where the performance of the promise is either impossible in law or physically impossible. A promise by A (without authority from B) to discharge a debt due to B, is a promise whose performance is impossible by law, for no one without the requisite authority can release a debt due to another.¹ So is an undertaking "that plaintiff's tract of land shall sell for a certain sum by a given day;" for no man can in legal contemplation force the sale of another's property by a given day, or by any day, as of his own act.² So where a charter party executed on March 15 covenanted that a ship should sail on or before February 12 it was held that the covenant being impossible at the time the deed took effect, was wholly nugatory.³

By physical impossibility is meant an impossibility "according to the state of knowledge of the day;"⁴ as a promise to discover treasure by magic,⁵ or a promise to go from London to Rome in three hours.⁶

Practical impossibility unknown to the parties when they entered into their contract may avoid it on the ground of mistake; impossibility of performance arising subsequent to the making of the contract may under certain circumstances operate as a discharge. But these questions will be considered in another chapter.

§ 102. **Nor Vague.** — In *White v. Bluett*,⁷ an action was brought by executors upon a promissory note made payable to the testator by his son, the defendant in the action. The son pleaded a promise made by his father to discharge him from all liability in respect of the note in consideration of

¹ *Harvey v. Gibbons*, 2 Lev. 161.

² *Stevens v. Coon*, 1 Pinney, 357.

³ *Hall v. Cazenove*, 4 East, 477.

⁴ *Clifford v. Watts*, L. R. 5 C. B. 588.

⁵ Indian Cont. Act, § 56.

⁶ *The Harriman*, 9 Wall. 172.

⁷ 23 L. J. (Ex.) 36.

his ceasing to make certain complaints which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children. The court said that the promise given by the son was no more than a promise "not to bore his father," and was too vague to support his father's promise to discharge the son from liability on the note. "A man might complain that another person used the highway more than he ought to do, and that other might say 'do not complain and I will give you £5.' It is ridiculous to suppose that such promises could be binding. So if the holder of a bill of exchange were suing the acceptor and the acceptor were to complain that the holder had treated him badly or that the bill ought never to have been circulated and the holder were to say, 'Now, if you will not make any more complaints I will not sue you,' such a promise would be like that now set up. In reality there was no consideration at all."

§ 103. Promise to Do What Party Bound to Do.—A promise to do or the doing of what a person is under a previous legal obligation to perform, forms no new matter for a consideration, and cannot support a promise.¹ This obligation may arise either from (a) contract or from (b) the law. (a) Thus where a sailor having agreed to make a certain voyage for a certain sum, and before it had ended refused to complete the voyage unless promised more,² and where a person agreed to enlist for a bounty of \$250, and afterwards another person having offered to give him more he refused to enlist until he had been promised \$350,³ in both these cases, the promises so made were held to be

¹ *Ellison v. Jackson Co.*, 12 Cal. 442; *Holmes v. Boyd*, 90 Ind. 33; *Warren v. Hough*, 121 Mass. 126; *Stuber v. Schack*, 83 Ill. 191; *Ayers v. Chicago, etc., R. Co.*, 52 Iowa, 478; *McDonald v. Nelson*, 2 Cow. 139; 14 Am. Dec. 431; *Swaggard v. Hancock*, 25 Mo. App. 596; *Harris v. Cassidy*, 107 Ind. 158; *Hennessey v. Hill*, 52 Ill. 281; *Voorhees v.*

Reed, 17 Ill. (App.) 21; *Crossman v. Wohlleben*, 90 Ill. 537; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Watts v. French*, 19 N. J. (Eq.) 407; *Jenness v. Lane*, 28 Me. 475; *Tucker v. Bartle*, 85 Mo. 114.

² *Stilk v. Myrick* 2 Camp, 317.

³ *Reynolds v. Nugent*, 25 Ind. 328.

without consideration. Cases of this kind where a party to an agreement refuses to perform, on finding the contract more onerous than was expected, unless the other party will agree to make further compensation, and extra compensation is promised in order to secure performance of the contract are frequent. Such promises are voidable on the ground that the only consideration for them is the plaintiff's agreement to do what he was already under legal obligation to do, viz., perform his contract.¹ But these cases must be distinguished from those where parties in the execution of a contract become involved in difficulty thereunder, relinquish their rights under the old contract and make a new agreement, for here they simply discharge their old contract by a substituted agreement which is binding on the parties to it.²

(b) And where a person promised a witness more than his legal fees, if he would attend a trial as a witness,³ where a person promised a public officer a higher fee than his legal fees if he would perform a certain service within the line of his duty,⁴ the promises were held unenforceable. But the promise would be good if the service to be performed were outside or beyond the officer's legal duty.⁵

The doing what one is only morally bound to do, as paying a debt barred by the statute of limitations, is a good consideration for a promise.⁶

And a promise not to do what one has no legal right to do is not a valid consideration.⁷ In *White v. Bluett*⁸ the

¹ *Ayers v. Chicago, etc., Ry. Co.*, 52 Iowa, 478; *Reynolds v. Nugent*, 25 Ind. 328; *Owen v. Stevens*, 78 Ill. 472; *McCarty v. Hampton Building Assn.*, 61 Iowa, 237.

² *Post*; *Substituted Contracts. Monroe v. Perkins*, 9 Pick. 305; *Rollins v. Marsh*, 128 Mass. 116; *Moore v. Detroit Locomotive Works*, 14 Mich. 272; *Goebel v. Lynn*, 47 Mich. 489; *Lallimore v. Hansen*, 14 Johns. 330; *Coyne v. Lynde*, 10 Ind. 283; *Lawrence v. Dar-*

v. vey, 28 Vt. 264; *Connelly v. DeVoe*, 37 Conn. 570.

³ *Collins v. Godefroy*, 1 B. & Ad. 949.

⁴ *Downs v. McGlynn*, 2 Hilt. 14; *Smith v. Whildin*, 10 Pa. St. 39; 49 Am. Dec. 572; *Trundle v. Riley*, 17 B. Mon. 396.

⁵ *Trundle v. Riley*, 17 B. Mon. 396.

⁶ *Schreiner v. Cummings*, 63 Pa. St. 374. See *post*, § 108;

⁷ *Voorhees v. Reed*, 17 Ill. (App.) 21.

⁸ *Ante*, § 102.

court said: "The son had no right to complain, for the father might make what distribution of his property he liked, and the son's abstaining from doing what he had no right to do, can be no consideration." For a like reason a promise not to bring a suit which one has no legal right to bring cannot be supported.¹

§ 104. **Payment of Part of Debt.** — *The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt*, for it is doing no more than the debtor is already bound to do, and it is no consideration for a promise, express or implied, to forego the residue.² A for example owes B \$100. An acceptance by B of \$75 in discharge of the debt or a promise by B to A that he will

¹ *Ante*, § 99. .

² *Cumber v. Wane*, 1 Strange, 426; *Leverich v. Bates*, 6 Ala. 480; *Agee v. Steele*, 8 Ala. 948; *Wilson v. Bank*, 9 Ala. 847; *Barrow v. Vandervort*, 18 Ala. 232; *Pearson v. Thomason*, 15 Ala. 700; *Singleton v. Thomas*, 78 Ala. 205; *Pope v. Tunstall*, 2 Ark. 209; *Gavin v. Arnan*, 2 Cal. 494; *Delano v. Hellit*, 27 Cal. 611; 87 Am. Dec. 102; *Liening v. Gould*, 13 Cal. 598; *Warren v. Skinner*, 30 Conn. 559; *Rose v. Hall*, 26 Conn. 395; 68 Am. Dec. 402; *Molyneux v. Collier*, 13 Ga. 406; *Brown v. Ayer*, 24 Ga. 478; *Neal v. Handley*, 116 Ill. 418; *Curtiss v. Martin*, 29 Ill. 567; *Hayes v. Iron Co.*, 125 Ill. 626; *Rosenmueller v. Lampe*, 89 Ill. 212; *Iron Co. v. Detweiler*, 23 Ill. App. 656; *Slater v. Schack*, 83 Ill. 191; *Markel v. Spielter*, 28 Ind. 498; *Stone v. Lewman*, 28 Ind. 97; 4 G. Greene, 544; *Norris v. Slaughter*, 3 G. Greene, 116; *State v. Clark*, 12 Iowa, 335; *Royal v. Lindsay*, 15 Kan. 591; *St. Louis R. R. Co. v. Davis*, 35 Kan. 464; *Cutter v. Reynolds*, 8 B. Mon. 598; *Williams v. Langford*, 15 B. Mon. 569; *Fenwick v. Phillips*, 3 Met. (Ky.) 8; *Ricketts v. Hall*, 2 Bush, 249; *Arnold v. Park*, 8 Bush, 6; *Gelsner v. Kirchner*, 4 Gill & J. 305; 23 Am. Dec. 566; *Jones v. Ricketts*, 7 Md. 103; *Campbell v. Booth*, 8 Md. 107; 15 Md. 569; *Gurley v. Hiteshue*, 5 Gill, 218; *Obernoff v. Union Bank*, 31 Md. 126; 1 Am. Rep. 31; *Guild v. Butler*,

127 Mass. 386; *Hastings v. Lovejoy*, 140 Mass. 261; *Harriman v. Harriman*, 12 Gray, 341; *Brooks v. White*, 2 Met. 285; 37 Am. Dec. 95; *Smith v. Bartholomew*, 1 Met. 276; 35 Am. Dec. 385; *Twitcheil v. Shaw*, 10 Cush. 46; 57 Am. Dec. 80; *Potter v. Green*, 6 Allen, 442; *Jennings v. Chase*, 10 Allen, 526; *Curran v. Rummell*, 118 Mass. 482; *Lathrop v. Page*, 129 Mass. 21; *Sage v. Valentine*, 23 Minn. 102; *Lankton v. Stewart*, 27 Minn. 346; *Jones v. Perkins*, 29 Miss. 189; *Price v. Cannon*, 3 Mo. 453; *Riley v. Kershaw*, 52 Mo. 224; *Blanchard v. Noyes*, 3 N. H. 518; *Fisher v. Willard*, 20 N. H. 121; *Matthewson v. Strafford Bank*, 45 N. H. 107; *Daniel's v. Hatch*, 21 N. J. (L.) 391; 47 Am. Dec. 169; *Harrison v. Close*, 2 Johns. 448; 3 Am. Dec. 444; *Seymour v. Minturn*, 17 Johns. 169; 8 Am. Dec. 380; *Dederick v. Leman*, 9 Johns. 338; *Mechanics' Bank v. Hazard*, 13 Johns. 353; *Johnson v. Brannan*, 5 Johns. 268, 271; *Moss v. Shannon*, 1 Hilt. 177; *Blum v. Hartmann*, 3 Dely. 47; *Keeler v. Salisbury*, 33 N. Y. 648; 13 Abb. Pr. 101; 1 Hilt. 515; *White v. Jordan*, 27 Me. 370; *Bailey v. Day*, 26 Me. 88; *McKenzie v. Culbreth*, 66 N. C. 534; *Bryan v. Foy*, 69 N. C. 45; *Hayes v. Davidson*, 70 N. C. 573; *Eve v. Moseley*, 2 Strob. 203; *Harper v. Graham*, 30 Ohio, 105; *Goodman v. Fallett*, 25 Vt. 386; *Stone v. Scammon*, 6 Wis. 497.

take \$75 in full of all claims is not binding on B, who may sue for the \$25 unpaid in the first case or for the full sum of \$100 in the second. This rule of the common law while adhered to in the American courts is regarded as harsh in its application to particular facts, and hence the judges have been ready to seize on any circumstance which could take the case out of the principle upon which it rests. Therefore numerous exceptions to the rule are to be found, and so numerous are they as to make the rule itself more shadow than substance. The exceptions are—

(a) Where the debtor does something different from what the creditor is entitled to demand. Thus where A owes B \$100 the giving by A of a negotiable instrument for the debt, or property instead of money, as “the gift of a horse, a hawk or a robe. For it shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.”¹ So the agreement is sufficiently supported, where it is made before the maturity of the debt;² or at a different place than the original debt was made payable, or was in law payable;³ or by a person other than the debtor;⁴ or to a person other than the original creditor;⁵ or the creditor receives some additional advantage in the shape of additional security, or where the debt is unliquidated or the amount disputed.⁶

(b) Where the contract is wholly executory, if the liabilities of both parties are as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own.⁷

¹ *Cumber v. Wane*, 1 Strange, 426.

² *Bowker v. Childs*, 3 Allen, 434.

³ *Pinnel's Case*, 5 Coke, 117a; *Jones v. Perkins*, 29 Miss. 139; 64 Am. Dec. 136; *Blanchard v. Noyes*, 3 N. H. 518.

⁴ *Whelan v. Edwards*, 29 Ga. 315; *Riley v. Kershaw*, 52 Mo. 224.

⁵ *Morton v. Burn*, 7 Ad. & E. 26; *Scotson v. Pegg*, 6 Hurl. & N. 295.

⁶ *Kidder v. Blake*, 45 N. H. 330; *Jones v. Bullett*, 2 Litt. 49; *Pitkin v. Noyes*, 48 N. H. 294; 2 Am. Rep. 218.

⁷ *Anson Contr.* 84; *Lattimore v. Harsen*, 14 Johns. 330; *Rollins v. Marsh*.

(c) Where the agreement to forego the residue is by a writing under seal, here of course consideration is presumed.¹

(d) Where the creditor on receipt of part of the debt makes the debtor a gift of the residue, for an executed gift is irrevocable by the donor.²

§ 105. **Compositions with Creditors.**—At first blush a composition with creditors might seem to fall under the rule just stated, inasmuch as each creditor agrees to accept a less sum than due him in satisfaction of his claim. But in these cases, the promise to pay or the payment of a part of the debt is not the consideration upon which the creditor gives up the residue, but the giving up a part of their claims by the other creditors, parties to the agreement, is the consideration for each one giving up a part and accepting the composition in discharge of his whole debt.³

§ 106. **Consideration must be Legal.**—The consideration must not be illegal, immoral or contrary to public policy.⁴

§ 107. **Consideration is Executory or Executed.**—A consideration is executory or executed. An executed consideration is some act performed or some value given, at the time of the making of the promise, and in return for the promise then made. An executory consideration is a promise to do or to give something in return for the promise then made.⁵

128 Mass. 116; *Munroe v. Perkins*, 9 Pick 298; *Stewart v. Keteltas*, 36 N. Y. 388; *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96; *King v. Julet*, 7 M. & W. 55.

¹ See *ante*, § 65.

² *Bishop Contr.* § 50. *Lawson Rights, Rem. & Pr.* § 1331.

³ *Steinman v. Magnus*, 11 East, 390; *Norman v. Thompson*, 4 Ex. 755; *Boyd v. Hind*, 1 Hurl. & N. 938; *Good v. Cheese-*

man, 2 B. & Ad. 928; *Eaton v. Lincoln*, 13 Mass. 424; *Gifford v. Allen*, 3 Met. 265; *Henry v. Patterson*, 57 Pa. St. 346; *Perkins v. Lockwood*, 100 Mass. 250; *Farrington v. Hodgdon*, 119 Mass. 483; *Robert v. Barnum*, 80 Ky. 28; *Murray v. Snow*, 37 Ia. 410; *White v. Kuntz*, 107 N. Y. 518.

⁴ See *post*, *Legality*.

⁵ *Leake Contr.* 18.

§ 108. **Past Consideration.**— A past consideration will not support a promise for it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise.¹ A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.² In *Bulkley v. Landon*,³ the plaintiff alleged that the defendants in consideration that they (the plaintiffs) would indorse a certain note signed by a third person, promised that they (the defendants) would hold themselves liable as makers. This seemed a clear case, until the contract agreement which the defendant had made was examined, for it read: "In consideration of your *having indorsed* notes drawn by D. T. we hereby hold ourselves responsible," etc. This was held a past consideration and the defendant had judgment. But to this general rule there are several exceptions, viz.:—

(a) A past consideration will support a subsequent promise if the consideration was given at the request of the promisor.⁴ Thus if one request another to perform a service for him under circumstances which reasonably imply a promise of recompense, a subsequent promise to pay for

¹ *Boston v. Dodge*, 1 Blackf. 19, 12 Am. Dec. 206; *Shealoy v. Toole*, 56 Ga. 210; *Trulove v. Hardy*, 38 Mich. 690; *Comstock v. Smith*, 7 Johns. 87; *Osier v. Hobbs*, 33 Ark. 215; *Wilson v. Edmunds*, 24 N. H. 517; *Green v. First Parish*, 10 Pick. 540; *Dearborn v. Bowman*, 3 Metc. 155; *Shepherd v. Young*, 8 Gray. 152; *Williams v. Hathaway*, 19 Pick. 387; *Chamberlin v. Whitford*, 102 Mass. 450; *Allen v. Bryson*, 67 Ia. 591; *Carson v. Clark*, 1 Scam. (Ill.), 113; *Bartholomew v. Jackson*, 20 John 28; 11 Am. Dec. 237.

² *Anson Contr.* 92.

³ 2 Conn. 104.

⁴ *Lampleigh v. Braithwart*, Hob. 105; 1 Smith L. Cas. 67; *Allen v. Woodward*, 23 N. H. 544; *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329; *Chaffee v. Thomas*, 7 Cow. 358; *Comstock v. Smith*, 7 Johns. 87; *Pool v. Homer*, 64 Md. 133; *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Goldsby v. Robertson*, 1 Blackf. 247; *Dearborn v. Bowman*, 3 Met. 155; *Carson v. Clark*, 2 Ill. 113.

the services so rendered is enforceable.¹ So if a person incurs a legal liability, at the request of another, as by entering into a contract with a third party or otherwise, such liability is a sufficient consideration to support a promise by the person at whose request it is incurred.² If one request another to pay money for him, in a manner importing an undertaking to repay it, the amount, when paid, becomes a debt,—the request to pay and the payment according to the request forming a contract to pay the amount which is technically described in law as a debt “for money paid by the plaintiff for the defendant at his request.”³

(b) If one without authority voluntarily does, on behalf of another, that which the other was legally bound to do, the latter may ratify the act by a subsequent promise of recompense, and the ratification will be equivalent to a previous request importing such promise.⁴

(c) Where a promise for a valuable consideration cannot be enforced against the will of the promisor, by reason of some rule or provision of law meant for his advantage, he may, subsequently, if of full capacity to contract, renounce the benefit of such rule or provision by renewing his original promise.⁵ A promise by a person of full age

¹ See cases in last note and *Hicks v. Burhans*, 10 Johns. 243; *Oatfield v. Waring*, 14 Johns. 188; *Davidson v. Gas Light Co.*, 99 N. Y. 586; *Milliken v. Telegraph Co.*, 110 N. Y. 497; *O'Connor v. Beckwith*, 41 Mich. 637; *Wilson v. Edmonds*, 24 N. H. 517. In *Merrick v. Giddings*, 1 Mackey, 394, it is said that when services are performed at request, a subsequent promise different from that which the law implies from the request is *nudum pactum*.

² *Mound City, etc., Assn. v. Slawson*, 65 Cal. 425; *Callahan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106; *Skidmore v. Bradford*, L. R. 8 Eq. 134.

³ *Leake Cont.* 55.

⁴ *Gleason v. Dyke*, 22 Pick. 390, 393; *Doty v. Wilson*, 14 Johns. 378, 382;

Hassinger v. Solms, 5 S. & R. 4, 8; *Paynter v. Williams*, 1 Crompt. & Mees. 819; *Seymour v. Marlboro*, 40 Vt. 171. In *Booth v. Fitzpatrick*, 36 Vt. 681, it is held that “if the consideration, even without request, move directly from the plaintiff to the defendant, and inures directly to defendant's benefit, the promise is binding though made upon a past consideration.” See *McMorris v. Harnden*, 2 Bailey, 56; 21 Am. Dec. 515.

⁵ *Jamison v. Ludlow*, 3 La. Am. 492; *Lonsdale v. Brown*, 4 Wash. 86; *Womach v. Womach*, 8 Tex. 397; 58 Am. Dec. 119; *McKelvey v. Tate*, 8 Rich. 339; *Katz v. Moore*, 18 Md. 556; *Feeny v. Daly*, 3 Cal. 84; *Shepard v. Rogers*, 7 R. I. 470; 84 Am. Dec. 573;

to pay a debt contracted during his minority is binding though made on no new consideration.¹ So is a promise to pay a debt barred by the statute of limitations,² or after a discharge in bankruptcy.³ The principle upon which these cases rest is, "that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it."⁴ In these cases the action is brought on the original promise, and the new promise simply operates as a *waiver* by the promisor of a defense which the law gives him against an action on the old promise.⁵

§ 109. **Consideration Obtained by Fraud.**—Where by his own fraud a person has obtained a benefit, he cannot set up such fraud to show that he had made no previous request.⁶ Thus where a man fraudulently representing himself to be the owner of land induced another to labor on it in expectation of becoming a joint owner, it was held that the latter on discovering the fraud, might sue for and recover the value of his services. And founded on this principle is a Missouri case where a woman having discovered that her husband was already married was permitted to recover the value of her services while living with him.⁷ But where consideration has been obtained by means of a

Scouton v. Eislord, 7 Johns. 36; *Erwin v. Saunders*, 1 Cow. 249; 13 Am. Dec. 520; *Shippey v. Henderson*, 14 Johns. 178; 7 Am. Dec. 458; *Maxim v. Morse*, 8 Mass. 127.

¹ Cases cited in last note; *Reed v. Batchelder*, 1 Met. 559.

² *Keener v. Crull*, 19 Ill. 189; *Carroll v. Forsyth*, 69 Ill. 127; *Little v. Blunt*, 9 Pick. 488; *Weston v. Hodgkins*, 126 Mass. 326.

³ *St. John v. Stephenson*, 90 Ill. 82;

Katz v. Moessinger, 110 Ill. 372; *Allen v. Ferguson*, 18 Wall 1

⁴ *Parke, B.*, in *Earle v. Oliver*, 2 Ex. 71.

⁵ *Way v. Sperry*, 6 Cush. 238, 241; *Shippey v. Henderson*, 14 Johns. 178; *Betton v. Cutts*, 11 N. H. 170; *Norton v. Colby*, 52 Ill. 198; *Marshall v. Tracy*, 74 Ill. 379; *Yaw v. Kerr*, 47 Pa. St. 333; *Shepard v. Rhodes*, 7 R. I. 470.

⁶ *Lawson Rights, Rem. & Pr.*, § 243.

⁷ *Higgins v. Breen*, 9 Mo. 497.

contract though induced by fraud, the plaintiff cannot assert any other contract than that in fact made. He may affirm it or may disaffirm it and recover the consideration or damages for the fraud.¹

§ 110. **Failure of Consideration.**—A total failure of consideration avoids the contract, and is a good defense to a suit upon it.² But a subsequent depreciation in the value of the thing or its failure is no defense.³ As where the object for the accomplishment of which a subscription was given fails,⁴ or stock in a corporation which a person purchases becomes of no value,⁵ or a patent sold on credit becomes worthless on account of subsequent improvements.⁶ A partial failure of consideration is a defense *pro tanto*.⁷

¹ Leake Contr. 62; Barkhamsted v. Case, 5 Conn. 523; 13 Am. Dec. 92.

² Jones v. Buffum, 50 Ill. 277; Hodgkins v. Moulton, 100 Mass. 311; Morrow v. Hanson, 9 Ga. 398; 54 Am. Dec. 347; Westervelt v. Manufacturing Co., 14 Daly. 382; Dodge v. Oates, 27 Kan. 762; Jones v. Hathaway, 77 Ind. 14; Snyder v. Kurtz, 61 Ia. 598; Montellus v. Wood, 56 Ia. 254; Sorrells v. McHenry, 38 Ark. 127; Simpson, etc., College v. Bryan, 50 Ia. 298; Powell v. Subers, 67 Ga. 448; Thompson v. Wheeler etc. Man. Co., 29 Kan. 476; Jeffries v. Lamb, 73 Ind. 902; House v. Kendall, 55 Tex. 40.

³ Blackman v. Dowling, 63 Ala. 304; Daniel v. Tarver, 70 Ga. 208; Dowdy v. McLellan, 52 Ga. 408; Kerchner v. Gettys, 18 S. C. 521; Potter v. Earnest, 45 Ind. 416; Perry v. Buckman, 33 Vt. 7; Taylor v. Mayhew, 11 Helsk. 596; Topp v. White, 12 Helsk. 165; Byrne v. Cummings, 41 Miss. 192; Smock v. Pierson, 68 Ind. 405.

⁴ Smith v. Sower, 2 Duv. 17.

⁵ Gore v. Mason, 18 Me. 84.

⁶ Harrison v. Bird, 23 Wend. 113.

⁷ Folsom v. Mussey, 8 Me. 400; 23 Am. Dec. 523; Marston v. Sweet, 66 N. Y. 206; 23 Am. Rep. 43; Smith v. Busby, 15 Mo. 387; 57 Am. Dec. 207.

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§ 111. **Introductory.** — Having completed an examination of the methods by which a contract may be formed we have next to examine the question as to its binding nature in view of the parties who have entered into it, for the purpose of determining whether or not they were legally capable of contracting. We shall therefore in this chapter discuss the matter first of (A) Parties in General, following this with a statement of the causes from which incapacity to contract may arise. And it will be found that the following are under a greater or less disability in this respect, viz.: (B) The State or Government; (C) Aliens; (D) Convicts; (E) Corporations; (F) Infants; (G) Married Women; (H) Insane Persons; (I) Drunkards, and (J) Agents.

A.

PARTIES IN GENERAL.

§ 112. **Two Parties Necessary.** — Two parties are essential to every contract¹ for a man cannot sue himself or enter into any obligation enforceable by law with himself; ² nor can the same person be a party on both sides, although

¹ *Carson v. Clark*, 1 Scam. 113; 25 Am. Dec. 79.

² *Taussig v. Hart*, 58 N. Y. 425; *Collins v. Tilton*, 58 Ind. 374; *Whitehead v. Hellen*, 76 N. C. 99.

other persons be joined with him on the one side or the other.¹ One of the parties, however, may not be in existence at the time, or at least not ascertained; as in the case of an offer of a reward, which may be accepted by any one performing the services required.² No action can be maintained upon an instrument in writing for the payment of money, unless the instrument shows on its face to whom it is payable.³ But a variance or mistake in the names of parties to a contract, whether individuals or corporations, is not fatal to their contracts, if there be a sufficient description of the parties, by which they may be identified.⁴ The question as to who are the parties to a contract is one for the jury.⁵

§ 113. One Not a Party to a Contract Enforcing it.—

It is a principle of the common law that one cannot acquire rights under a contract to which he is not a party and hence no right to enforce a contract is given to a person not a party to it or an assignee of such a party.⁶ There must be a privity, as it is called, between the party who made the promise and the party who seeks to enforce it. Thus, if I were to contract with B to furnish me materials for my house, agreeing to make him certain advances as they were delivered, and B was to inform C of it and tell him that he might do the work if he chose, C could not step in, do the work, and sue me for the price. "A man cannot be made debtor to any indefinite number with whom he never contracted, by their making arrangements with one

¹ *Moffatt v. Van Millingen*, 2 B. & C. 124, *note*; *De Tastet v. Shaw*, 1 B. & Ald. 664; *Faulkner v. Lowe*, 2 Ex. 595.

² *Ante*, § 26.

³ *Mayo v. Chenoweth*, 1 Ill. 200.

⁴ *Medway Manfg. Co. v. Adams*, 10 Mass. 360.

⁵ *Miller v. Ford*, 4 Rich. 376; 55 Am. Dec. 687.

⁶ *Price v. Easton*, 4 B. & Ad. 433; *Tuttle v. Catlin*, 1 D. Chip. 346; 12 Am.

Dec. 691; *Rossman v. Townsend*, 17 Wis. 95; 84 Am. Dec. 733; *Ross v. Milne*, 12 Leigh, 204; 37 Am. Dec. 646; *Ellison v. Jackson Co.*, 12 Cal. 542; *Seaman v. Whitney*, 24 Wend. 260; 35 Am. Dec. 619; *Figure v. Mut. Soc.*, 46 Vt. 362; *Haskett v. Flint*, 5 Blatchf. 69; 33 Am. Dec. 452; *Laidlow v. Hatch*, 75 Ill. 11; *Hall v. Carpen*, 27 Ill. 386; 81 Am. Dec. 234. An offer made to one person cannot be accepted by another. *Leake Cont.* 48.

with whom he has contracted to deliver property on his contract."¹ So where a water company contracted to supply a city with water to extinguish fires, but failed to do so, it was held that a citizen whose property had been burned through such failure could not sue the company for the breach.² But several exceptions have always been ingrafted on this rule and the rule itself is now almost obsolete in most of the States.

(a) If A's promise to B amounts to a trust in favor of C, C can sue on it by virtue of the fiduciary relation which such a promise creates. Thus if a person conveys property to another directing that it shall be held for the benefit of a third person, not a party to the transaction, the latter may enforce the trust in a court of equity.³

(b) Where the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff, it is no objection that there is want of privity between the parties to the action, or that the consideration did not move from the plaintiff. The law creates both the privity and the promise.⁴

(c) A near relationship between the promisee and the person who is to take a benefit under the contract will give such person a right of action.⁵

(d) In the code States the statutory provision that every

¹ *Rossman v. Townsend*, 17 Wis. 95; 84 Am. Dec. 733; *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9.

² *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485; *Fowler v. Athens City Water Co.*, 83 Ga. 219; 20 Am. St. Rep. 313; *Becker v. Keokuk Water Works*, 79 Ia. 419; 18 Am. St. Rep. 377.

³ *Railroad Co. v. Durant*, 95 U. S. 576; *Allen v. Withrow*, 110 U. S. 119; *Preacher's Aid Soc. v. England*, 106 Ill. 125; *Chace v. Chapin*, 130 Mass. 128; *Harrisburg Bank v. Tyler*, 3 W. & S. 373; *Mory v. Michael*, 18 Md. 227.

⁴ *Mellen v. Whipple*, 1 Gray, 322; *Lewis v. Sawyer*, 44 Me. 332; *Taylor v. Taylor*, 20 Ill. 650; *Hosford v. Kanouse*,

45 Mich. 620; *Keen v. Sage*, 75 Me. 140; *Spencer v. Towles*, 18 Mich. 9; and see *ante*, § 33; *Implied Contracts*.

⁵ This was laid down in England in the case of *Bourne v. Mason*, 1 Vent. 6, in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But this case, though overruled in a later English case (*Tweddle v. Atkinson*, 1 B. & S. 393), has been followed in Massachusetts. *Felton v. Dickinson*, 10 Mass. 287; *Mellen v. Whipple*, 1 Gray, 322; *Exchange Bank v. Rice*, 107 Mass. 42.

action must be prosecuted in the name of the real party in interest, gives the party for whose benefit a contract is made the right of action.¹ And even independent of the codes the modern American rule is that where a person makes a promise to another for the benefit of a third person, the latter may maintain an action upon it.² But to such a suit by a third person a failure of consideration, or a rescission of the contract by the parties thereto, before the acceptance by the plaintiff of the stipulation in his favor, is a defense.³

(e) A may represent B, in virtue of a contract of employment subsisting between them, so as to become his mouth-piece or medium of communication with C, and give both B and C rights as against each other. This employ-

¹ Pomeroy on Remedies, § 139; Bliss on Code Pleadings, 241.

² *Hendrick v. Lindsey*, 93 U. S. 143; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Brewer v. Dyer*, 7 Cush. 337; *Smith v. Kemper*, 4 Mart. (La.) 409; 6 Am. Dec. 708; *Schemerhorn v. Vanderheyden*, 1 Johns. 139; 3 Am. Dec. 305; *Mason v. Hall*, 30 Ala. 601; *Treat v. Stanton*, 14 Conn. 454; *Morgan v. Overman Co.*, 37 Cal. 537; *Arnold v. Lyman*, 17 Mass. 400; 9 Am. Dec. 154; *Joslin v. N. J. Car Co.*, 38 N. J. (L.) 141; *Jones v. Thomas*, 21 Gratt. 101; *Kimball v. Noyes*, 17 Wis. 698; *Bellav. v. Fagely*, 19 Pa. St. 276; *Bristow v. Lane*, 21 Ill. 194; *Bohanan v. Pope*, 42 Me. 96; *Flint v. Cadenasso*, 64 Cal. 83; *Marigny v. Remy*, 3 Martin, N. S., 607; 15 Am. Dec. 172; *Dearborn v. Parks*, 5 Me. 81; 17 Am. Dec. 306; *Kelly v. Evans*, 3 Penn. & W. 887; 24 Am. Dec. 325; *Hind v. Holdship*, 2 Watts, 104; 26 Am. Dec. 107; *Blymire v. Boystle*, 6 Watts. 182; 31 Am. Dec. 458; *Cox v. Skeen*, 2 Ired. 220; 38 Am. Dec. 691; *Barker v. Bucklin*, 2 Denio, 45; 48 Am. Dec. 727; *Edmonson v. Penny*, 1 Pa. St. 334; 44 Am. Dec. 137; *Brown v. O'Brien*, 1 Rich. 268; 44 Am. Dec. 254; *Robbins v. Ayres*, 10 Mo. 538; 47 Am. Dec. 125; *Machias Hotel Co. v. Coyle*, 35 Me. 406; 58 Am.

Dec. 713; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5.

³ *Amonett v. Montague*, 75 Mo. 43. In England, the recipient of a telegraph message cannot maintain an action against the company for damages caused by its negligence either in sending it incorrectly or not sending it at all. The obligation on the part of the company is one of contract with the sender, to which the receiver is not a party, and under which he can claim no rights. In the United States, this technical rule is not recognized, but a telegraph company may be sued by the party to whom a message is addressed for damage resulting from its neglect. *New York, etc., R. R. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140; *Wolfskihl v. Western Union Tel. Co.*, 46 Hun, 542; *Rose v. United States Tel. Co.*, 6 Robt. 305; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Aiken v. Tel. Co.*, 5 S. C. 358; *Western Union Tel. Co. v. Hope*, 11 Ill. App. 289; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530.

ment for the purpose of representation is the contract of agency. The subject of agency is considered elsewhere.¹

§ 114. **Contract Cannot Bind One Not Party to it.**— Except that parties to a contract are presumed to bind their personal representatives as well as themselves,² an agreement does not bind a person not a party to it.³

§ 115. **But May Impose Duties on Him.**— But though a contract cannot impose the burdens of an *obligation* upon one who was not a party to it, nevertheless a contract does impose a *duty*, upon persons extraneous to the obligation, not to interfere with its due performance. In the leading case of *Lumley v. Gye*,⁴ the plaintiff, being the manager of an opera house, engaged a singer to perform in his theater. The defendant induced her to break her contract. The plaintiff sued the defendant for procuring this breach, and it was held that without deciding that an action would lie against one who procured the breach of any kind of contract, such an action would lie, at any rate, for inducing a servant to quit the services of his master. And in the subsequent case of *Bowen v. Hall*,⁵ the case was not limited to the relation of master and servant, but the broad principle was laid down that a man who induces one of the parties to a contract to break it, intending thereby to injure the other, is liable to an action. The decisions in the United States are not harmonious. It is not denied in our courts that an action will lie for wrongfully enticing away another's servant or apprentice.⁶ But in a Maine

¹ See *post*, § 165.

² *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744.

³ *Bolles v. Carl*, 12 Minn. 113.

⁴ 2 E. & B. 216.

⁵ 6 Q. B. Div. 339.

⁶ *Lawson Rights, Rem. & Pr.*, 289; *Woodward v. Washburn*, 3 Denio, 369; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. (L.) 569; *Ames v. Union Railway Co.*, 117

Mass. 541; *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780; *Walker v. Cronin*, 107 Mass. 555; *Jones v. Blocker*, 43 Ga. 381; *Daniel v. Swearingen*, 6 S. C. 297; 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82; 40 Am. Rep. 680; *Butterfield v. Ashley*, 2 Gray, 254; *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Milburne v. Byrne*, 1 Cranch C. C. 239; *Haight v. Badgley*, 15 Barb. 499.

case¹ it is said: "A man may advise another to break a contract, if it be not a contract for *personal services*. He may use any lawful influences or means to make his advice prevail. In such a case the law deems it not wise or practicable to inquire into the motive that instigates the advice. His conduct may be morally and not legally wrong." On the other hand in Massachusetts it is said that the principle of *Lumley v. Gye* applies to "all contracts of employment, if not to contracts of every description;"² and in North Carolina that "the same reasons cover every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts of service."³

§ 116. **Joint and Joint and Several Contracts.** — Two or more persons may bind themselves jointly, or severally, or jointly and severally, and different rights and liabilities are created in each case.

1. Where two or more persons make a joint contract each is liable for the full performance of the whole contract.⁴ Upon the death of one the liability devolves on the survivor or survivors, and the representatives of the deceased cannot be sued,⁵ unless there are special circumstances which show that the liability should be treated as a several one.⁶ The making of a joint promise is implied from the use of such words as "we promise,"⁷ "we agree,"⁸ "we under-

¹ *Haywood v. Tillson*, 75 Me. 100.

² *Walker v. Cronin*, 107 Mass. 555.

³ *Jones v. Stanley*, 76 N. C. 355; and see *Dudley v. Briggs*, 141 Mass. 534; *Rice v. Manley*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. 335; *Jones v. Blocker*, 43 Ga. 321; *Burger v. Carpenter*, 2 S. C. 7.

⁴ *Allin v. Shadburne*, 1 Dana, 68; 25 Am. Dec. 121; *Fild v. Runk*, 2 N. J. L. 325; *Slocum v. Fairchild*, 7 Hill, 292; *Ripley v. Crooker*, 47 Me. 370; 74 Am. Dec. 491; *Clark v. Rawson*, 3 Denio, 135; *Eichbaum v. Irons*, 6 W. & S. 67; 40 Am. Dec. 540; *O'Brien v. Bound*, 2 Speer, 495; 42 Am. Dec. 384.

⁵ *Lawson Rights*, Rem. & Pr., § 2383; *Brown v. Beight*, 3 Blackf. 37; 23 Am. Dec. 373.

⁶ *Sumner v. Powell*, 2 Mer. 30. In an instrument reading, "We, the subscribers, promise to pay A B, teacher, the following rates of tuition," etc., the liability of the subscribers is several, and not joint. *Beck v. Pounds*, 20 Ga. 36.

⁷ *Mayor v. Ripley*, 5 La. 121; 25 Am. Dec. 175.

⁸ *McCullis v. Thurston*, 27 Vt. 596.

take,"¹ etc. So where several persons execute an instrument, in parol or under seal, upon the same consideration, at the same time, and for the same purpose, and taking effect from a single delivery;² so where parties enter into a contract under seal in their individual characters, they are jointly responsible, although they, in fact, contract as a committee in anticipation of an incorporation.³ Where the contract is made with several as joint promisees, they must all join in enforcing it.⁴

2. Two or more persons may bind themselves severally for the same matter, so that the creditor is entitled to claim the whole debt or performance against each debtor separately.⁵ Or one person may bind himself to each of several persons for the same debt or matter, so that each of the persons is separately entitled as creditor to claim the whole debt or performance.⁶

3. Persons may enter into concurrent contracts respecting the same matter, binding themselves jointly as one party, and also severally as separate parties, at the same time; in which case, besides the one joint contract, there are also as many several contracts as there are separate persons, the debt or matter of the contract being one and the same in all the contracts thus made.⁷ Where the obligatory part of a bond was in these words: "We are holden and bound unto M. C., in the sum of five hundred dollars, for the payment of which we bind ourselves and each of us;" it was held a joint and several bond, on which an action could be brought against one of the obligors separately.⁸

4. Whether the contract is joint or several, or joint and

¹ *New Haven, etc., Co. v. Hayden*, 119 Mass. 361.

² *Stage v. Olds*, 12 Ohio, 158.

³ *Lincoln v. Crandell*, 21 Wend. 101; *Rowland v. Phalen*, 1 Bosw. 43; *Eichbaum v. Irons*, 6 Watts & S. 67; 40 Am. Dec. 546; *Presbyterian Church v. Manson*, 4 Rand. 197.

⁴ *Cannon v. Maull*, 4 Harr. 223; *Lawson Rights, Rem. & Pr.*, § 2384.

⁵ *Lawson Rights, Rem. & Pr.*, § 2355; *Lurton v. Gilliam*, 1 Scam. 577; 33 Am. Dec. 430.

⁶ *Lawson Rights, Rem. & Pr.*, § 2385; *Rorabacher v. Lee*, 16 Mich. 169.

⁷ *Klapp v. Kleckner*, 3 Watts & S. 519.

⁸ *Carter v. Carter*, 2 Day, 442; 2 Am. Dec. 113.

several, is one of intention. If the contract made by several persons purports simply to bind themselves or to covenant, without more, the obligation or covenant is taken to be joint only and not several; if the contract purports that they bind themselves or covenant severally, the liability is separate; if they purport to bind themselves jointly and severally or to bind themselves and each of them, or to covenant for themselves and each of them, using both joint and several words the liability is both joint and several. A contract will be construed to be joint or several according to the interests of the parties, if the words are capable of that construction, or even if they are not inconsistent with it; if the words are ambiguous or will admit of it the contract will be joint if the interest be joint, and it will be several if the interest be several.¹

B.

THE STATE OR GOVERNMENT.

§ 117. **Power of State to Contract.**—The power of the United States government and the governments of the several States to make contracts is recognized as “an incident to the general right of sovereignty,”² and this capacity to contract is co-extensive with the functions of the State or government.³ But the power is absent where it is in opposition to an express constitutional limitation or inhibition or where it is beyond the sphere and not in furtherance of the objects for which the government was organized. When a State enters into a contract it can claim no exemption from the rules of law applicable to contracts between individuals.⁴ The State is not bound by general words in a statute which invade its prerogative of

¹ Lawson Rights, Rem. & Pr., § 2387.

² U. S. v. Lane, 3 McLean, 365; U. S. v. Tingey, 5 Pet. 114; Floyd Acceptances, 7 Wall. 666, Danolds v. State, 89 N. Y. 36.

³ U. S. v. Maurice, 2 Brock. 96; U.

S. v. Lane, 3 McLean, 365.

⁴ Patton v. Gilmer, 42 Ala. 548; 94 Am. Dec. 665.

sovereignty.¹ Thus, unless it is expressly named, neither the general government nor a State is bound by a statute of limitation or bankruptcy,² nor by a statute restricting the manner in which certain suits should be brought.³

Contrary to the rule of construction as between private individuals⁴ a government grant is construed most strongly against the grantee because it is presumed that the grant was procured at his instance and that the language emanated from him.⁵ But this rule it is said does not fully apply to the case where a grant is made upon adequate valuable consideration and the subject consists of mere rights of property not related to a public use, or affecting limitations upon the prerogative of the government.⁶

§ 118. *May Sue on its Contracts.* — The State or government has the same power of bringing and maintaining suits as an individual has.⁷ A State may sue in its own courts or in the courts of another State or in the Federal courts or the national government may sue in the State courts.⁸ A public officer cannot sue on a public contract made by him; the action must be brought by his principal, the government.⁹

¹ *Commonwealth v. Baldwin*, 1 Watts, 54; *U. S. v. Hoar*, 2 Mason, 311; *Swearingen v. U. S.*, 11 G. & J. 373; *Savings Bk. v. U. S.* 19 Wall. 279.

² *People v. Herkimer*, 4 Cow. 543; 15 Am. Dec. 379.

³ *Savings Bank v. U. S.*, 19 Wall. 227.

⁴ See *post*; *Construction*.

⁵ *Priestley v. Foulds*, 2 Man. & G. 194; *Canal Co. v. Wheelley*, 2 B. & Ad. 792; *Canal Commr. v. People*, 5 Wend. 423; *State v. Morgan*, 23 La. Ann. 482; *R. R. Co. v. Reid*, 64 N. C. 158; *Allegheny v. R. R. Co.*, 26 Pa. St. 360; *Dugan v. Bridge Co.*, 27 Pa. St. 309; *Hartford Bridge Co. v. Ferry Co.*, 29 Conn. 222; *Charles River Bridge v. Warren Bridge*,

11 Pet. 544; *Rice v. R. R. Co.*, 1 Black, 880; *Mills v. County*, 2 Gilm. 197, 227; *N. W. Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *Mayor, etc., R. R. Co.*, 97 N. Y. 281.

⁶ *Langdon v. Mayor, etc.*, 93 N. Y. 145; *Dermott v. State*, 99 N. Y. 107; *Garrison v. United States*, 7 Wall. 688.

⁷ *U. S. v. Barker*, 1 Paine, 156; *State v. Grant*, 10 Minn. 39; *Spencer v. Brockway*, 1 Ohio, 122; 13 Am. Dec. 259; *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 377; *U. S. v. Murdock*, 18 La. 345; 89 Am. Dec. 651.

⁸ Cases in last note.

⁹ *Gray v. Paxton, Quincy*, 541; *Irish v. Webster*, 5 Me. 171.

§ 119. **But Cannot be Sued.**—But neither the United States¹ nor a State² can be sued. This is a privilege of sovereignty originally belonging to the king who, for reasons of public policy, was exempted from being made a defendant in his courts. But the United States or a State may consent to the suit by waiving its exemption³ or may grant permission by some statutory or constitutional provision.⁴ “The only remedy for a party who has entered into a contract with a State is by an appeal to the legislature, who it is fair to presume will from motives of public duty make provision for its full execution and do ample justice to the party with whom it may have contracted: or else refer the case to the decision and judgment of the judiciary by a special legislative enactment.”⁵

§ 120. **Public Officers and Agents.**—The government of course contracts through its officers and agents. When the form of contracting is prescribed by law these agents must make the contract in that form.⁶ The rule that an agent may bind his principal by acts in violation of his special instructions, if they are within the scope of his general authority, does not apply to public officers, because their powers are a matter of record in the public laws.⁷ Therefore the government is bound only when the officer is actu-

¹ U. S. v. Clarke, 8 Pet. 436; U. S. v. Murdock, 18 La. 706; 89 Am. Dec. 651; The Siren, 7 Wall. 133; Orleans Nav. Co. v. The Amella, 7 Mart. 590; 12 Am. Dec. 516.

² Hunsaker v. Borden, 5 Cal. 288; 63 Am. Dec. 130; Pattison v. Shaw, 6 Ind. 377; Michigan Bk. v. Hammond, 1 Doug. 527; Michigan Bk. v. Hastings, 1 Doug. 225; Troy, etc., R. Co. v. Commonwealth, 127 Mass. 43; Treasurers v. Cleary, 3 Rich. 372.

³ Cohens v. Virginia, 6 Wheat. 214; Garr v. Bright, 1 Barb. Ch. 157; Sinking Fund Commrs. v. Northern Bk., 1 Met. (Ky.) 174.

⁴ Divide v. Harvie, 7 T. B. Mon. 439;

18 Am. Dec. 194. For example a remedy in certain cases against the United States has been given by the establishment of the court of claims. And in most of the States provision is made whereby the State is amenable to some judicial tribunal at the instance of its citizens.

⁵ Michigan State Bk. v. Hastings, 1 Doug. (Mich.) 225; 41 Am. Dec. 549.

⁶ People v. Talmage, 6 Cal. 256; Delafield v. Illinois, 2 Hill, 159; Osborne v. Tunis, 25 N. J. (L.) 663; Mayor of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535; State v. Little Rock, etc., R. Co., 31 Ark. 701; Clark v. U. S., 95 U. S. 539.

⁷ Mayor of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535.

ally authorized to make the contract.¹ A public officer, unlike a private agent,² is not personally liable on a contract made in his own name, for it is "not to be presumed that the party dealing with such public officer, means to rely upon his individual responsibility."³

§ 121. **Foreign Governments and their Representatives.**—The same rules substantially which apply to a government in its own courts, apply to it in foreign courts. Foreign States and sovereigns and their representatives, and the officials and households of their representatives, are not subject to the jurisdiction of the courts of this country unless they submit themselves to it. A contract entered into with such persons cannot therefore be enforced against them unless they so choose, although they are capable of enforcing it.⁴

C.

ALIENS.

§ 122. **Aliens in General.**—An alien is the subject of a foreign government not naturalized under our laws. The rights of aliens in real property are generally regulated by the States.⁵ In some States they are given such right, in

¹ *Woodward v. Campbell*, 39 Ark. 350; *State v. Bevers*, 86 N. C. 588; *State v. Hastings*, 10 Wis. 518; *Mayor of Baltimore v. Eschbach*, 18 Md. 276; *Lee v. Munro*, 7 Oranch, 366; *Curtis v. U. S.*, 2 Nott. & H. 144; *Hull v. County of Marshall*, 12 Ia. 142; *Pierce v. U. S.*, 1 Nott. & H. 270; *Grant v. U. S.*, 5 Nott. & H. 71; *The Floyd Acceptances*, 7 Wall. 606; *State v. Hayes*, 52 Mo. 578; *Noble v. U. S.*, 11 Ct. of Cl. 608.

² See *post*; *Agents*.

³ *Pine v. Huber Manfg. Co.*, 83 Ind. 121; *Sheffield v. Watson*, 1 Cranch, 345; *Hodgson v. Dexter*, 1 Cranch, 345; *Stinchfield v. Little*, 1 Greenlf. 231; *Walker v. Swartwout*, 12 Johns. 444; *Osborne v. Kerr*, 12 Wend. 179; *Crowell*

v. Crispin, 4 Daly, 100; *Hodges v. Runyan*, 30 Mo. 491; *Enloe v. Hall*, 1 Humph. 303; *Bernard v. Torrance*, 5 S. & J. 383; *Jones v. LeTombe*, 3 Dall. 384; *Brazelton v. Colyar*, 2 Baxt. 234; *Reed v. Conway*, 26 Mo. 13; *Savage v. Gibbs*, 4 Gray, 601; *Tippets v. Walker*, 4 Mass. 595; *Dawes v. Jackson*, 9 Mass. 490; *Brown v. Austin*, 1 Mass. 208; *Bainbridge v. Downie*, 6 Mass. 253; *Rathbone v. Budlong*, 15 Johns. 1; *Mott v. Hicks*, 1 Cow. 513; *Bronson v. Wolsey*, 17 Johns. 46; *Sheffield v. Watson*, 3 Calnes, 69; *Fox v. Drake*, 8 Cow. 191; *Belknap v. Reinhart*, 2 Wend. 375.

⁴ *Bishop Contr.*, § 998.

⁵ See *Stimson Stat. Law*, 6013; *State v. Smith*, 70 Cal. 160.

others they are not. In respect to personalty and the obligations arising out of contracts and the remedies for breach of them, they have, during the existence of peace, substantially the privileges of natural-born subjects.

§ 123. **Alien Enemies.** — An alien enemy, *i. e.*, a person usually domiciled and residing here but the subject of a nation with which we are at war, cannot without a license from our government¹ make any new contract² or enforce any existing contract³ during the continuance of hostilities,⁴ and a contract made during the war cannot be enforced on return of peace.⁵

But the rights of the alien as to outstanding contracts made before the commencement of war are suspended, not annulled, and may be enforced upon the conclusion of peace.⁶ During the Civil War the inhabitants of the Confederate States and the United States occupied the respective positions of enemies, and as a consequence thereof all intercourse between them was interdicted, and contracts between them made during the existence of hostilities were void.⁷ Contracts existing before the war were preserved: it only suspended the remedy; but if the contract was of a continuing nature, as in the case of a

¹ License to remain and protection will be implied from his being suffered to remain, without being ordered out of the country by the executive. *Clark v. Morey*, 10 Johns. 68; *Zacharie v. Godfrey*, 50 Ill. 193; *Bradwell v. Weeks*, 13 Johns. 1; *Otteridge v. Thompson*, 2 Cranch C. C. 108; *Parkinson v. Wentworth*, 11 Mass. 26.

² *Wright v. Graham*, 4 W. Va. 480; *Phillips v. Hatch*, 1 Dillon, 571; *Hill v. Baker*, 32 Iowa, 302.

³ *Blackwell v. Willard*, 65 N. C. 402; *Wilcox v. Henry*, 1 Dall. 69; *Mumford v. Mumford*, 1 Gall. 366; *Brooke v. Filer*, 35 Ind. 402; *Semmes v. City Ins. Co.*, 38 Conn. 543; *Bell v. Chapman*, 10 Johns. 183; *Johnson v. Decker*, 11 Johns. 418; *Haymond v. Camden*, 22 W. Va. 180; *Strum v. Fleming*, 22 W. Va. 404.

⁴ *The Rapid*, 2 Gall. 4; *The Eliza*, 2 Gall. 4; *Crawford v. The Wm. Penn.*, 3 Wash. C. C. 484; *Marchand v. Coyle*, 18 La. Ann. 682; *Shotwell v. Ellis*, 42 Miss. 489.

⁵ *Hart v. U. S.*, 15 Ct. of Cl., 414; *Willison v. Patteson*, 7 Taunt. 439; *Dorsey v. Kyle*, 30 Md. 512; 96 Am. Dec. 617 and note.

⁶ *Ware v. Hylton*, 3 Dall. 199; *Dunlop v. Ball*, 2 Cranch, 180; *Harman v. Kingston*, 3 Camp. 150; *Filindt v. Waters*, 15 East, 260.

⁷ *Muterson v. Howard*, 18 Wall. 99; *De Jarnett v. Giverville*, 56 Mo. 446; *Habrecht v. Alexander*, 1 Wood, 413; *Mutual Ins. Co. v. Hilyard*, 37 N. J. L. 444.

partnership, and its performance would violate the laws governing a state of war, the parties were relieved from further obligations thereunder.¹

D.

CONVICTS.

§ 124. **Convicts' Contracts.**—A person convicted of felony cannot, during the continuance of his conviction, make a valid contract; nor can he enforce contracts made previous to conviction; but these may be enforced by an administrator appointed for the purpose by the court. If the convict be sentenced for life he becomes *civiliter mortuus*, or dead in law, in respect to his estate as if he were dead in fact.²

E.

CORPORATIONS.

§ 125. **Corporation Defined.**—A corporation is an artificial being created by law, composed of individuals united into one body under a collective name, with the capacity of perpetual succession, and of acting as a natural person within the scope of its charter.³ Corporations are either *public* or *private*, the former being such as are created for the discharge of public duties in the administration of civil government, as for example municipal corporations,⁴ the latter being such as are created for private advantage, profit or benefit.⁵ Corporations which are organized for private

¹ *Mutual Ins. Co. v. Hillyard*, 37 N. J. L. 444; *University v. Finch*, 18 Wall. 106; *Bank of New Orleans v. Mathews*, 49 N. Y. 12; *Cohen v. N. Y. Ins. Co.*, 50 N. Y. 610.

² *Re Nerac*, 35 Cal. 372; 95 Am. Dec. 111.

³ *Lawson Rights, Rem. & Pr.*, § 332; *Fletsam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492; *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150; *Louis-*

ville R. R. Co. v. Letson, 2 How. 558; *Thomas v. R. R. Co.*, 101 U. S. 82; *Davis v. R. R. Co.*, 131 Mass. 259.

⁴ *Regents v. Williams*, 9 Gill & J. 385; 31 Am. Dec. 72; *Ten Eyck v. Canal Co.*, 18 N. J. (L.) 200; 87 Am. Dec. 233; *Tinsman v. R. R. Co.*, 26 N. J. (L.) 143; *School Comm. v. Putnam*, 44 Ala. 566.

⁵ *Logwood v. Bank, Minor*, 23; *Cleveland v. Stewart*, 3 Ga. 283; *Rundle v. Delaware Canal*, 1 Wall Jr. 275.

profit, but yet exercise functions and powers in which the public are interested, as for example railroad, turnpike, or canal companies, are sometimes termed *quasi-public* corporations,¹ yet in so far as their rights and liabilities to contract is concerned they are subject to the rules of law governing private corporations.²

§ 126. Contracts of Corporations —When Binding.—

A corporation, then, has power to make such contracts as are either expressly or impliedly authorized by its charter or act of incorporation, and in general an express authority to make a given kind of contract is not indispensable, provided they are not foreign to the corporate purpose.³ Thus a corporation has an implied power to purchase and hold property necessary to the carrying on of its business⁴

¹ See *Lawson Rights, Rem. & Pr.*, § 333; *Miners Ditch Co. v. Zellebach*, 37 Cal. 543; 96 Am. Dec. 300; *Louisville, etc. R. Co. v. County Court*, 1 Sneed, 637; 62 Am. Dec. 424; *Mower v. Leicester*, 9 Mass. 247; 6 Am. Dec. 63; *Riddle v. Proprietors*, 7 Mass. 169; 5 Am. Dec. 35; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Adams v. Bush*, 1 Me. 363; *School Dist. v. Wood*, 13 Mass. 198; *Bennett's Appeal*, 65 Pa. St. 213; *Pierce v. Com.*, 104 Pa. St. 150.

² The subject of corporate rights and liabilities has grown to such a vast extent during the past few years that the limits of a single volume would hardly suffice for anything like a full discussion. I shall not, therefore, attempt such a thing here, but content myself with a statement of a few of the general principles of the law in regard to the contracts of corporations. For a full view of this important subject see *Morawetz on Corporations*, Cook on *Stockholders*, and especially the great and exhaustive treatise of Judge Seymour D. Thompson, now in press.

³ *Thomas v. R. R. Co.*, 101 U. S. 82; *Ferrine v. Canal Co.*, 9 How. 184; *Nat. Bk. v. Godfrey*, 23 Ill. 579; *Western Cottage, etc., Co. v. Reddish*, 51 Iowa, 55; *Richardson v. Mass. Charitable Assn.*,

131 Mass. 174; *Wechler v. First Nat. Bk.*, 42 Md. 581; 20 Am. Rep. 95; *Booth v. Robinson*, 55 Md. 419; *Wayland University v. Boorman*, 56 Wis. 637; *State v. Rice*, 65 Ala. 83; *Searight v. Payne*, 6 Lea. 283; *Cleveland & Mahoning R. R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321; 41 Am. Rep. 509; *Dodge v. Council Bluffs*, 57 Iowa, 560; *Bassett v. Monte Christo Mining Co.*, 15 Nev. 223; *Detroit v. Mutual Gas Co.*, 43 Mich. 594; *Indiana v. Worman*, 6 Hill, 33; *Bangor Boom Co. v. Whiting*, 29 Me. 123; *Marine Bank v. Ogden*, 29 Ill. 248; *Eureka Flour Mills v. Smith*, 6 Cal. 1; *Moss v. Averell*, 10 N. Y. 457; *Brown v. Winnisimmet Co.*, 11 Allen, 334; *Curtis v. Leavitt*, 15 N. Y. 64; *West v. Madison Co. Board*, 82 Ill. 207.

⁴ *Banks v. Poltiaux*, 3 Rand. 136; 15 Am. Dec. 706; *Spear v. Crawford*, 14 Wend. 22; 28 Am. Dec. 513; *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378; *McCarter v. Orphan Asylum*, 9 Cow. 437; 18 Am. Dec. 517; *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19; 46 Am. Dec. 183; *Thompson v. Waters*, 25 Mich. 222; 12 Am. Rep. 243; *Lathrop v. Bank*, 8 Dana, 114; 38 Am. Dec. 481; *Callaway Co. v. Clark*, 32 Mo. 303; *Moss v. Averill*, 10 N. Y. 449; *Aull Sav. Bk. v. Lexington*, 74 Mo. 104.

and to transfer and dispose of it when necessary;¹ to borrow money and make debts for the purpose of its business,² and to issue negotiable paper or other evidence of its indebtedness.³

§ 127. **Powers of Corporations—Meaning of Ultra Vires.**—A corporation has only such powers as are expressly conferred upon it by its charter or as are necessary to carry such powers into effect.⁴ Any act of the corporation beyond its express or implied powers is said to be *ultra vires*; and though such acts are void, it is not because they are illegal but simply because the corporation is without capacity to perform them. “When acts of corporations are spoken of as *ultra vires* it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation.”⁵

§ 128. **Contract Ultra Vires Unenforceable Unless Executed.**—A contract *ultra vires*, that is to say, outside

¹ Treadwell v. Manfg. Co., 7 Gray. 373; 66 Am. Dec. 490; Warfield v. Canning Co., 72 Ia. 686; 2 Am. St. Rep. 263; Story v. Plank Road Co., 16 N. J. (Eq.) 13; 84 Am. Dec. 134; Buell v. Buckingham, 16 Ia. 284; 85 Am. Dec. 516; White Water Canal Co. v. Vallette, 21 How. 424; Reynolds v. Commrs., 5 Ohio, 204; Aurora Agric. Soc. v. Paddock, 80 Ill. 268; Burton's Appeal, 57 Pa. St. 213; Dupee v. Boston Water Co., 114 Mass. 37; Pierce v. Emery, 32 N. H. 486.

² Lawson Rights, Rem. & Pr., § 383; Mining Co. v. Bank, 104 U. S. 192; Moss v. Harpeth Academy, 7 Helsk. 285; Rockwell v. Elkhorn Bk. 13 Mo. 653; Barnes v. Ontario Bk., 19 N. Y. 152; Smith v. Eureka Flour Mills, 6 Cal. 1.

³ Munro v. Commission Co., 15 Johns. 41; 8 Am. Dec. 219; Curtis v. Leavitt, 15 N. Y. 173; Booth v. Robinson, 55 Md. 419; McIntyre v. Preston, 5 Gilm. 48; 48 Am. Dec. 321; Goodrich v. Reynolds, 31 Ill. 490; 83 Am. Dec. 240.

⁴ Dartmouth College v. Woodward, 4 Wheat. 636; New York Fireman's Ins. Co. v. Ely, 5 Conn. 560; 13 Am. Dec. 100; Matthews v. Skinker, 62 Mo. 329; 21 Am. Rep. 425; Beatty v. Warren Ins. Co., 2 Johns. 109; 3 Am. Dec. 401; People v. Utica Ins. Co., 15 Johns. 358; 8 Am. Dec. 243; Leggett v. N. J. Man. Co., 1 N. J. (Eq.) 541; 23 Am. Dec. 728; Franklin Co. v. Lewiston Inst., 68 Me. 43; 28 Am. Rep. 9; Commonwealth v. R. Co., 27 Pa. St. 339; 67 Am. Dec. 471; State v. Mayor of Mobile, 5 Port. 279; 30 Am. Dec. 564; Chicago Gas Co. v. Peoples Gas Co., 121 Ill. 530; 2 Am. St. Rep. 124; Miners Ditch Co. v. Zellerbach, 37 Cal. 543; 99 Am. Dec. 300; Head v. Providence Ins. Co., 2 Cranch, 127; Weckler v. Bank, 42 Md. 581.

⁵ Whitney Arms Co. v. Barlow, 63 N. Y. 68; 20 Am. Rep. 504; Bisell v. Michigan, etc., R. Co., 23 N. Y. 269; Cairns Chancellor in Ashbury Carriage Co. v. Riche; L. R. 7 H. L. 683; L. R. 9 Ex. 224.

of and not authorized by its charter — may be avoided by either party so long as it remains unexecuted.¹ Courts will not compel a corporation to perform a contract *ultra vires*.² Nor will they enforce specific performance of a contract *ultra vires* at the suit of the corporation.³ But, where the contract cannot be enforced because it is *ultra vires*, the benefits which either party has received under the contract the courts will require to be repaid to the other.⁴ And where the contract has been performed or partially performed by either of the parties, the other cannot set up as a defense to an action that the corporation had no authority to enter into it.⁵

Any contract made or act done by a corporation, contrary to a rule of law, is as invalid as such a contract or act would be in the case of an individual;⁶ and the same principle applies to contracts or acts prohibited by statute.⁷ So, too,

¹ *Bradley v. Ballard*, 53 Ill. 413; 7 Am. Rep. 636. The court saying: "This doctrine (of estoppel) is applied only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished. But while a contract remains executory it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so but on the application of a stockholder or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So too if a contract *ultra vires* is made between a corporation and another person and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages."

² *Hitchcock v. Galveston*, 96 U. S. 341; *Bank v. Niles*, Walk. Ch. 99; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30.

³ *Bank v. Niles*, 1 Doug. (Mich.) 401; 41 Am. Dec. 575; *Nassau Bk. v. Jones*, 96 N. Y. 115.

⁴ *Brice's Ultra Vires*, 2d ed. 769;

Hardy v. Land Co., L. R. 7 Ch. 427; *In re Phoenix Life Ass. Co.*, 2 Johns. & H. 441; *Humphrey v. Patrons' Assn.*, 50 Iowa, 607; *In re German Mining Co.*, 4 De Gex. M. & G. 19; *In re Electric Tel. Co.*, 29 Beav. 353; *In re Cork, etc., R. Co.*, L. R. 4 Ch. 760; *New Castle R. Co. v. Simpson*, 23 Fed. Rep. 214.

⁵ *Morawetz on Corporations*, § 100; *Hitchcock v. Galveston*, 96 U. S. 341; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Arnot v. R. Co.*, 67 N. Y. 319; *State Board v. R. Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Merchants Bk. v. Central Bk.*, 1 Ga. 418; 44 Am. Dec. 635; *German-town Mut. Ins. Co. v. Dhein*, 43 Wis. 420; 28 Am. Rep. 559; *Wright v. Pipe Line Co.*, 101 Pa. St. 204; 47 Am. Rep. 701; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Am. Un. Tel. Co. v. R. Co.*, 1 McCrary, 183; *Whitney Arms Co. v. Barlow*, 63 N. Y. 63; 20 Am. Rep. 504.

⁶ *Thomas v. R. Co.*, 10 U. S. 71; *Harford R. Co. v. R. Co.*, 3 Robt. 416; *Messenger v. R. Co.*, 38 N. J. L. 413; 13 Am. Rep. 457. See *post*; *ILLEGALITY OF CONTRACT*.

⁷ *Paugborn v. Westlake*, 36 Iowa, 546; *Harris v. Runnels*, 12 How. 79.

where the act or contract is in violation of any provision in the charter or act of incorporation,¹ though a distinction is to be made in this latter case, which is, that where it appears clear from the words of the charter that the legislature intended that a forbidden act or contract should be absolutely void, it will be so held by the courts;² while on the other hand, where the prohibition in a charter appears to have been inserted for the benefit of the shareholders only, a contract or act in violation of the prohibition, though *ultra vires*, is not absolutely void, but may be executed and ratified by the corporation.³

Formerly the assent of the corporation could only be shown by the use of its corporate seal, but it is now well settled in this country at least, that this is not essential, and that a corporation may make a valid contract without the use of a seal.⁴

F.

INFANTS.

§ 129. Introductory.—An infant or minor is without capacity (subject to the exceptions to be presently noticed)

¹ Taylor v. R. Co., L. R. 2 Ex. 379; In re Cork R. Co., L. R. 4 Ch. App. 748; In re Hitchcock, 7 Ala. (N. S.) 386; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Whitney v. Peay, 24 Ark. 22; Rutland R. Co. v. Proctor, 29 Vt. 98; Ohio Life Ins. Co. v. Merchants' Ins. Co., 11 Humph. 24; 58 Am. Dec. 742; State Board v. R. Co., 47 Ind. 411; Wood Mac. Co. v. Caldwell, 54 Ind. 271; Bank v. Owens, 2 Pet. 597; Martin v. Zellerbach, 38 Cal. 300; 99 Am. Dec. 365; Crocker v. Whitney, 71 N. Y. 161; People v. Utica Ins. Co., 15 Johns. 383; 8 Am. Dec. 243; Bank v. Swayne, 8 Ohio, 257; 82 Am. Dec. 707; Sherwood v. Alvis, 83 Ala. 115; 3 Am. St. Rep. 696.

² In re Comstock, 3 Saw. 218; Bank v. Page, 6 Or. 431.

³ Hazelhurst v. R. Co., 43 Ga. 18; Ayres v. Banking Co., L. R. 3 P. C. 548; National Bank v. Matthews, 98 U. S. 621;

Thornton v. Bank, 71 Mo. 231; Mott v. U. S. Trust Co., 19 Barb. 568.

⁴ Morawetz on Corporations, §§ 167-170; Mott v. Hicks, 1 Cow. 513; 18 Am. Dec. 551; Angell and Ames on Corporations, § 257; The Banks v. Poitiaux, 3 Rand. 186; 15 Am. Dec. 706; Barker v. Ins. Co., 3 Wend. 94; 20 Am. Dec. 664; Garrison v. Combs, 7 J. J. Marsh. 84; 22 Am. Dec. 121; American Ins. Co. v. Oakley, 9 Paige, 496; 38 Am. Dec. 561; Ross v. City, 1 Ind. 281; 48 Am. Dec. 361; Chestnut Hill Turnpike v. Ruiter, 4 Serg. & R. 6; 8 Am. Dec. 675; School District in Rumford v. Wood, 13 Mass. 199; Bank of U. S. v. Dandridge, 12 Wheat. 64; Bank of Columbia v. Patterson, 7 Cranch, 299; Union Bank v. Ridgeley, 1 Har. & G. 324; Fleckner v. Bank of U. S., 8 Wheat. 338; Danforth v. Schoharie Turnpike Co., 12 Johns. 227.

to make a binding contract. And as this incapacity could not without great confusion be determined as a matter of fact in each particular case, the law has established an arbitrary age under which all persons are incapable as a matter of law of entering into contracts. This age the common law declares to be the age of twenty-one, and so do our statutes for the most part, though in some States by statute females reach their majority at the age of eighteen. It is obvious that a man within a few months of twenty-one may be as well able to protect his rights as one a few months over that age and much better than an infant of six: yet the law makes no distinction but holds a youth who has nearly reached his majority to be no more bound by his contract than a child of tender years.¹ The infant's emancipation by the parent does not make his contracts otherwise voidable, absolutely binding upon him. He may still take advantage of his infancy as before. The effect of the emancipation is simply to release him from the parent's control and to give him the right to his own earnings.² So the marriage of a male infant does not render his general contracts any the more binding; nor is the condition of infancy removed from a female infant by her marriage, by reason of statutes which confer capacity upon married women either to contract generally or to convey their real estate or relinquish their claims to dower in the lands of their husbands.³

A parent, it should not be forgotten, is not under any legal obligation to pay the debts of his child, and this extends even to necessary food, clothing and shelter. "People are very apt to imagine," once said a judge,⁴

¹ *McCarty v. Carter*, 49 Ill. 58; 95 Am. Dec. 572; *Baker v. Lovett*, 6 Mass. 78.

² *Mason v. Wright*, 13 Met. 306; *Tyler v. Estate of Gallop*, 68 Mich. 185; 18 Am. St. Rep. 336; *Tandy v. Masterson's Admr.*, 1 Bibb. 330.

³ *Inhab. of Taunton v. Inhab. of Plymouth*, 15 Mass. 203; *Davis v. Caldwell*, 12 Cush. 512; *Walsh v. Young*, 110 Mass. 396; *Hartman v. Kendall*,

⁴ *Ind.* 408; *Harrod v. Myers*, 21 Ark. 592; 78 Am. Dec. 400; *Watson v. Billing*, 38 Ark. 278; 42 Am. Rep. 1; *Cummings v. Everett*, 82 Me. 260. The capacity of an infant to contract for necessities is, however, enlarged by his marriage; for he is bound for the reasonable value of necessities furnished his family as well as himself. *Post*, §136.

⁵ *Shelton v. Springett*, 11 C. B. 452.

"that a son stands in this respect upon the same footing as a wife.¹ But this is not so. If it be asked is then the son to be left to starve? The answer is he must apply to the authorities, and they will compel the father, if of ability, to pay for his son's support."²

§ 130. *Infants' Contracts Voidable, Not Void.* — Many of the earlier American cases are to the effect that such contracts as the infant may make which are manifestly to his prejudice and against his interest are void,³ while those which it is uncertain whether they are to his benefit or prejudice are voidable at his election.⁴ But it may now be considered as the settled rule that none of an infant's contracts are void because of his nonage, but all of them are merely voidable. The distinction that his contracts which cannot be for his benefit are absolutely void, has become to be recognized as unreasonable and absurd; for the object of the law which is to protect the infant against the consequences of his own indiscretion or the imposition of others is completely secured by conferring upon him the power of

¹ As to which see *post*, § 160.

² See *Kelly v. Davis*, 49 N. H. 176; 6 Am. Rep. 499, where the subject is ably reviewed, and *re Ryder*, 11 Paige, 185; 42 Am. Dec. 109.

³ *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Dana v. Combs*, 6 Me. 89; 19 Am. Dec. 194; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 527; *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149; *Kline v. Bebee*, 6 Conn. 494; *Chandler v. McKinney*, 6 Mich. 217; 74 Am. Dec. 686; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463; *Conroe v. Birdsall*, 1 John. Cas. 127; 1 Am. Dec. 105; *Phillips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 286; 19 Am. Dec. 71; *Vent v. Osgood*, 19 Pick. 572. And so in England in the early cases. *Gibbs v. Merrell*, 3 Taunt. 307; *Kean v. Boycott*, 2 H. Bl. 511.

⁴ *U. S. Bambrrough*, 1 Mason, 71; *Tucker v. Moreland*, 10 Pet. 59; 1 Am.

Lead. Cas. 224; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251, *McMinn v. Richmonds*, 6 Yerg. 9; *McGan v. Marshall*, 7 Humph. 121; *Langford v. Frey*, 8 Humph. 443; *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Robinson v. Weeks*, 56 Me. 102; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463, 568; *Levering v. Helghe*, 2 Md. Ch. 81; 3 Md. Ch. 365, 368; *Cronise v. Clark*, 4 Md. Ch. 403; *Monumental Building Assn. v. Herman*, 33 Md. 128; *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436; *Green v. Welding*, 59 Iowa, 679; 44 Am. Rep. 696. Other cases adopt this latter test in a somewhat qualified form, asserting that no contracts of an infant are void, unless they necessarily, or clearly, or certainly operate to his prejudice; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Vent v. Osgood*, 19 Pick. 572; *West v. Penny*, 16 Ala. 187; *Hastings v. Dollarhide*, 24 Cal. 195.

disaffirming his contracts or of ratifying them after reaching proper age, at his pleasure. There are serious difficulties in the way of the court determining either from the face of the transaction or from a collateral inquiry whether the contract was for the benefit or detriment of the infant, and it is much better to leave the question entirely to the infant to say whether the contract shall or shall not be binding upon him.¹

§ 131. **Infants Concealment or Misrepresentation as to Age.**— It is a rule well settled in courts of law that the contract of an infant otherwise voidable cannot be enforced against him because he dealt or traded as an adult. He is not thereby estopped from pleading his infancy as a defense.² Nor is he estopped from disaffirming his deed and maintaining an action to recover the land conveyed, by the fact that when the deed was executed he appeared and was believed by the grantee to be an adult.³ Nor even is his contract rendered binding at law so that a recovery can be had against him thereon, from the fact that he falsely represented himself to be of full age at the time the con-

¹ *Hyer v. Hyatt*, 3 Cranch, C. C. 276; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735, 738; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Poncee*, 8 Tex. 80; *Mustard v. Wohlford's Heir's*, 15 Gratt. 329; 76 Am. Dec. 209; *Petrow v. Wiseman*, 40 Ind. 148; *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 496; *Harner v. Dipple*, 31 Ohio St., 72; 27 Am. Rep. 496; *Holmes v. Rice*, 45 Mich. 142; *Fonda v. Van Horn*, 15 Wend. 631; *Shopshire v. Burns*, 46 Ala. 108; *Scranton v. Stewart*, 52 Ind. 68; *Owing v. Long*, 119 Mass. 408; *Bozeman v. Browning* 81 Ark. 364; *Illinois, etc., R. Co. v. Banner*, 75 Ill. 315; *Schneider v. Stahlr*, 20 Mo. 271. For an exhaustive note in regard to the contract of infants of all kinds; deeds of conveyance; contracts of sale of real property; purchase and mortgages of realty; leases; mechanics liens; marriage settlements; sales, exchanges and assignments of personal property;

chattel mortgages; purchases of personal property; trading contracts; partnership agreements and transactions; lending and borrowing of money; making of bills and notes and bonds; sealed contracts generally; interest; accounts stated; contracts of suretyship and insurance; contracts for shares in corporations; releases and compromises; agreements to refer to arbitration; contracts for services; contracts to marry; gifts; warrants of attorney; see note to *Craig v. Van Bibber*, 100 Mo. 584, in 18 Am. St. Rep. 573-723.

² *Miller v. Blankley*, 38 L. T. 527; *Van Winkle v. Ketcham*, 3 Calnes, 323; *Houston v. Cooper*, 3 N. J. L. 886; *Curtin v. Patton*, 11 Serg. & R. 303; *Oliver v. McClellan*, 21 Ala. 675; *Carpenter v. Pridgen*, 40 Tex. 32; *Faldis v. Allardt*, 35 Minn. 488.

³ *Buchanan v. Hubbard*, 96 Ind. 1.

tract was made, and the other party relied upon such representation in entering into the contract.¹ In equity, also, it is equally well settled as at law, that an infant is not estopped from avoiding his contract from the mere fact that he did not disclose his minority at the time he entered into the contract, and the other party believed him to be adult and dealt with him on that supposition.²

If, however, an infant is guilty of something more than a mere failure to disclose his infancy at the time the contract is entered into, and fraudulently represents that he is of full age or actively conceals his minority, whereby the other party is induced to enter into the contract, then it is held the infant will be estopped in equity by his fraud from avoiding the contract on the ground of infancy, to the prejudice of the other contracting party.³

§ 132. **The Non-Voidable Contracts of an Infant.**— But there are certain contracts of an infant which are binding upon him and cannot be avoided at his election, and these are: 1. Contracts made under a statutory authority. 2. Contracts which, if he had not made, the law would have compelled him to execute. 3. Ante-nuptial debts of wife. 4. Contracts for necessities.

§ 133. **Contracts Under Statutory Authority.**— If a contract of a minor be entered into under the authority or

¹ *Bartlett v. Wells*, 1 Best & S. 838; *De Roo v. Foster*, 12 Com. B. N. S. 273; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; *Brown v. McCune*, 5 Sand. 224; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Merriam v. Cunningham*, 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Conrad v. Lane*, 28 Minn. 389; 37 Am. Rep. 412; *Norris v. Vance*, 3 Rich. (L.) 164; *Wieland v. Koback*, 110 Ill. 16; 51 Am. Rep. 676; *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Burdett v. Williams*, 30 Fed. Rep. 697; *Studosell v. Shapter*, 54 N. Y.

249; *Heath v. Mahoney*, 7 Hun, 100; *Vinsen v. Lockard*, 7 Bush. 468.

² *Stikeman v. Dawson*, 1 De Gex. & S. 90; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; *Davidson v. Young*, 38 Ill. 145; *Pyle v. Cravens*, 4 Litt. 17; *Price v. Jennings*, 62 Ind. 111; *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418; *Rivens v. Gregg*, 5 Rich. (Eq.) 274.

³ *Ferguson v. Bobo*, 54 Miss. 121; and see *Davidson v. Young*, 38 Ill. 145; *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105.

direction of a statute, it is binding upon him, so far as the question of infancy is concerned and cannot be disaffirmed. Whether infants are contemplated when not expressly mentioned in statutes, which provide for the execution of contracts under peculiar circumstances, is, of course, entirely a question of legislative intent. Where the statute is general in its terms, and such that it may apply to infants as well as adults, infants will be included, unless a contrary intent appears.¹

A recognizance entered into by a minor for his personal appearance at court to answer a charge of committing a criminal offense, is binding on him under statutes authorizing recognizances to be taken and defendants to be discharged thereon, and making no distinction between minor defendants who may commit crimes and be arrested and imprisoned and other persons.² And where by statute a person who is accused of being the father of a bastard child may be required to give bond to answer to a complaint made by the mother to a justice and to abide the order of the court thereon, his infancy is no defense to an action on the bond either for him or his sureties.³ So the government having the constitutional power to enlist minors into the army and navy of the United States, this it may do without the consent of the parents, guardians or masters; for the right of a parent, guardian or master to the service and control of the person of a minor child, ward or apprentice, is held in subordination to the sovereign right and power of the State to call upon its citizens to maintain and protect its existence. If the State recruits its army and navy by means of contracts of enlistment, such contracts may be made binding upon minors as well as adults.⁴

¹ *Earl of Bucks v. Drury*, Wilmet, 194; *People v. Mullin*, 25 Wend. 698.

² *State v. Weatherwax*, 12 Kan. 463; *Dial v. Wood*, 9 Baxt. 296.

³ *McCall v. Parker*, 13 Met. 372; *Inhabitants v. Wallace*, 50 N. J. (L.) 13;

People v. Moores, 4 Denio. 518; 47 Am. Dec. 272; *Gavin v. Burton*, 8 Ind. 67; *Stowers v. Hollis*, 83 Ky. 544.

⁴ *United States v. Bainbridge*, 1 Mason 71; *Com. v. Murray*, 4 Binn. 487; 5 Am. Dec. 412; *Com. v. Barker*, 5 Binn.

§ 134. **Contracts Which Law Would Have Compelled.**

Where any person does that which by law he is compelled to do, he is bound, and infants are not excepted from this rule.¹ Thus, where a father upon purchasing land, took the title in the name of his infant son for the purpose of defrauding his creditors, and afterwards sold the land, the son executing the deed to the purchaser at his father's direction during his infancy, it was held that as the infant's conveyance of the naked legal title was only that which a court of equity would have compelled him to make, he could not disaffirm it on attaining majority.² In *Trader v. Jarvis*,³ a father made an assignment of a title bond to his sons to indemnify them against any loss they might sustain by reason of their being sureties on the father's note. Afterwards, the father and sons assigned the title to a third person who agreed to pay and did pay the note, thereby releasing the sons from liability thereon as sureties. It was held that the conditions upon which the bond had been assigned to the sons having been performed, they had no further interest in it, and one of the sons could not avoid his assignment to the third person on the ground of his minority. So⁴ it has been held that where a son had the legal title to real estate in trust for his father, who executed a bond for the conveyance of the same and received the purchase money, the son, who conveyed the land in accordance with the requirements of the bond, could not set aside the deed, on the ground that he was a minor when it was executed. "Holding the title as he did for the benefit of his father who had sold the land to the defendant and received the purchase money, we do not see how, even if his

428; *Com. v. Downes*, 24 Pick. 227; *United States v. Blakeney*, 3 Gratt. 405; *Phelan's Case*, 9 Abb. Pr. 286; *re Gregg*, 15 Wis. 479; *re Higgins*, 16 Wis. 351; *Grace v. Wilber*, 10 Johns. 453; *Lanahan v. Birge*, 30 Conn. 438; *re McDonald*, 1 Low. 100; *re Morrissey*, 137 U. S. 157.

¹ *Bavington v. Clarke*, 2 Pen. & W.

115; 21 Am. Dec. 432; *Tucker v. Moreland*, 10 Pet. 59; *Irvine v. Irvine*, 9 Wall. 617; *Zouch v. Parsons*, 3 Burr. 1794.

² *Elliot v. Horn*, 10 Ala. 348; 44 Am. Dec. 488; *Slarr v. Wright*, 20 Ohio St. 97; *Bridges v. Bidwell*, 20 Neb. 185.

³ 28 W. Va. 100.

⁴ *Prouty v. Edgar*, 6 Iowa, 353.

infancy was conclusively established, he could have resisted the claim of defendant for the conveyance of the legal title. He would have been required in equity to convey." So where an infant purchases land at an administrator's sale for the administrator, and immediately conveys to him, he cannot disaffirm such conveyance on arriving at full age, although the lands belonged to him.¹

§ 135. **Ante-Nuptial Debts of Wife.**—An infant husband is liable at common law for such debts of his wife, contracted before marriage, as she would have been legally liable to pay had she remained sole. Therefore the infant husband is liable for all the ante-nuptial debts of the wife if she were adult when she contracted them, and for her debts for necessities, if she were an infant. The liability of the husband is, of course, not due to any ideas of contract on his part, but is a common law incident to the marriage; and the fact that the husband is an infant furnishes no excuse.²

§ 136. **Infant Liable for "Necessaries."**—An infant is liable for the reasonable value of necessities which may have been furnished to him, for otherwise he might not be able to procure suitable food, clothing, shelter and education, though possessed of the means of paying for them in the future.³ And he need not have expressly promised to pay for them; it is sufficient that they were furnished under such circumstances that a promise to pay for them can be

¹ *Shelden's Lessee v. Newton*, 3 Ohio St. 494.

² *Roach v. Quick*, 9 Wend. 338; *Butler v. Breck*, 7 Met. 184; 39 Am. Dec. 798; *Cole v. Seeley*, 25 Vt. 220; *Nicholson v. Wilborn*, 13 Ga. 467; *Anderson v. Smith*, 33 Md. 465.

³ *Earle v. Reed*, 10 Metc. 387; *Beeler v. Young*, 1 Bibb. 519; *Oliver v. McDuffie*, 28 Ga. 522; *Parsons v. Keyes*, 43 Tex.

557; *Johnston v. Maples*, 49 Ill. 104; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652. And this includes also necessities for the wife and children of an infant husband. *Tupper v. Caldwell*, 12 Metc. 562; *Price v. Saunders*, 60 Ind. 315; *Cantine v. Phillips*, 5 Harr. 428; *People v. Moores*, 4 Denio. 520; *Rivers v. Gregg*, 5 Rich. (Eq.) 274; *Chapman v. Hughes*, 61 Miss. 539.

implied.¹ Indeed, as we shall see, he cannot be held on an express contract to pay for them, if it appear that the price fixed by such contract is more than what they were reasonably worth.²

It should be remembered that an infant is liable for necessities, only where they have been actually furnished to him. He is not liable for breach of his contract to take and pay for them.³

§ 137. What are "Necessaries."—The term "necessaries" is a relative one; what would be "necessaries" in the case of one person might not be in the case of another person.⁴ "Necessaries" are not merely such things as are absolutely essential for the existence and support of the infant, but they are such things as are suitable to his station in life and to his circumstances at the time.⁵ Such things as food,⁶ clothing,⁷ proper lodging,⁸ instruction,⁹ medical attendance, or nursing, or medicine, or articles furnished for the purpose of health, are clearly within the term.¹⁰

¹ *Gay v. Ballou*, 4 Wend. 403; 21 Am. Dec. 158; *Hyman v. Cain*, 8 Jones, 111.

² See *post*.

³ *Pool v. Pratt*, 1 Ohlp. 252.

⁴ *Breed v. Judd*, 1 Gray, 455; *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434; *Rivers v. Gregg*, 5 Rich. (Eq.) 274; *Price v. Saunders*, 60 Ind. 360; *Smithpeters v. Griffin*, 10 B. Mon. 259.

⁵ *Watson v. Cross*, 2 Duv. 147; *Willelm v. Hardman*, 13 Md. 144; *Hyman v. Cain*, 8 Jones, 111; *Bradley v. Pratt*, 23 Vt. 378; *Glover v. Ott*, 1 McCord, 572; *Sculer v. Hydliff*, 9 Mich. 274; *Stone v. Dennison*, 13 Pick. 6; 23 Am. Dec. 654; *Davis v. Caldwell*, 12 Cush. 512; *McKama v. Merry*, 61 Ill. 177; *Peters v. Fleming*, 6 M. & W. 42; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Strong v. Foote*, 42 Conn. 208; *Nicholson v. Spencer*, 11 Ga. 610; *Jordan v. Coffield*, 70 N. C. 110; *Davis v. Caldwell*, 12 Cush. 512. A watch may be necessary in some cases. *Peters v. Fleming*, 6 M. & W. 42. So may wed-

ding clothes. *Sams v. Stockton*, 14 B. Mon. 187; or a bridal outfit. *Jordan v. Coffield*, 70 N. C. 110.

⁶ *Saunders v. Ott*, 1 McCord, 572; *Barnes v. Barnes*, 50 Conn. 572; *Price v. Saunders*, 60 Ind. 310; *Rivers v. Gregg*, 5 Rich. (Eq.) 274. This includes entertainment at an inn. *Watson v. Cross*, 2 Duv. 174.

⁷ *Saunders v. Ott*, *supra*; *Rivers v. Gregg*, *supra*; *Price v. Saunders*, *supra*.

⁸ *Rivers v. Gregg*, 5 Rich. (Eq.) 274; *Price v. Saunders*, 60 Ind. 310.

⁹ This includes a common school education. *Middlebury College v. Chandler*, 16 Vt. 688; 42 Am. Dec. 537; *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. (Eq.) 274. But not ordinarily a collegiate education. *Middlebury College v. Chandler*, *supra*. And certainly not a professional education. *Bouchell v. Clary*, 3 Brev. 194; *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574.

¹⁰ *Saunders v. Ott*, 1 McCord, 572; *Price v. Saunders*, 60 Ind. 310; *Werner's*

And the following limitations to the wider construction which might be given to this definition are supported by the authorities.

(a) The things must be necessary in the particular case for *use* and not for mere ornament.¹ Jewelry, kid gloves, cologne and walking canes are not "necessaries."²

(b) They must be for the substantial good of the infant and not for his mere pleasure.³ Thus liquor, pistols and powder, saddles and bridles, fiddles and fiddle-strings,⁴ cigars and tobacco,⁵ a horse purchased for pleasure,⁶ a bicycle,⁷ a buggy,⁸ money furnished for traveling expenses on a pleasure trip,⁹ are not "necessaries."

(c) They must concern the *person* and not the estate of the infant.¹⁰ Therefore, articles purchased or a building leased to carry on a business or trade are not "necessaries;"¹¹ nor supplies¹² or stock¹³ furnished him to carry on a plantation or farm, nor labor or materials for the erection of houses or buildings on his lands,¹⁴ or in repairing

Appeal, 91 Pa. St. 322. So of the services of a dentist. *Strong v. Foote*, 42 Conn. 208.

¹ *McKanna v. Merry*, 61 Ill. 179; *Peters v. Fleming*, 6 M. & W. 42; *Leflle v. Sugg*, 15 Ark. 137.

² *Leflle v. Sugg*, 15 Ark. 137.

³ *McKanna v. Merry*, 61 Ill. 179; *Wharton v. McKenzie*, 5 Q. B. 606; *Tupper v. Caldwell*, 12 Metc. 559; 46 Am. Dec. 704; *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537; *Turner v. Gaither*, 33 N. C. 357; 35 Am. Rep. 574; *Phelps v. Worcester*, 11 N. H. 51.

⁴ *Saunders v. Ott*, 1 McCord, 573; *Beeler v. Young*, 1 Bibb. 119; *Leflle v. Sugg*, 15 Ark. 137.

⁵ *Bryant v. Richardson*, L. R. 3 Ex. 93, note.

⁶ *Price v. Saunders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb. 509; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; *after* where it is on the advice of a physician for necessary exercise. *Hart v. Prater*, 1 Jur. 623.

⁷ *Payne v. Wood*, 145 Mass. 558.

⁸ *Howard v. Simpkins*, 70 Ga. 323.

⁹ *McKanna v. Merry*, 61 Ill. 177; *after* for a necessary journey. *Breed v. Judd*, 1 Grav. 455.

¹⁰ *Decell v. Lowenthal*, 57 Mass. 331; 34 Am. Rep. 449; *New Hamp. Mut. Ins. Co. v. Noyes*, 32 N. H. 345; *Sherman v. Cunningham*, 11 Cush. 40.

¹¹ *Howe v. Alexander*, 105 Ind. 109; *Pyne v. Wood*, 148 Mass. 558; *Mason v. Wright*, 13 Metc. 306; *Lowe v. Griffith* 1 Scott, 458.

¹² *Decell v. Lowenthal*, *supra*; *State v. Howard*, 88 N. C. 680.

¹³ *Rainwater v. Durham*, 2 N. & Mc. 524; 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Wood v. Losey*, 50 Mich. 475; *Howe v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189.

¹⁴ *Freeman v. Bridger*, 4 Jones (L.), 1; 67 Am. Dec. 258; *Price v. Saunders*, 60 Ind. 310; *Price v. Jennings*, 62 Ind. 111.

them,¹ nor an insurance policy on his property,² nor money lent to him to remove incumbrances on his estate.³ But the services of an attorney and the expenses of a purely personal suit are "necessaries," as for instance defending him on an indictment for a crime,⁴ or in a bastardy suit,⁵ or in an action for breach of promise of marriage.⁶ It is otherwise, of course, where the services are rendered in recovering the infant's lands.⁷

(d) They must not, even though they are "necessaries," be extravagant either in quality or quantity.⁸ Things may be of a useful character, but the quality or quantity supplied may take them out of the character of necessities. Elementary text-books might be a necessary to a student of law, but not a rare edition of "Littleton's Tenures," or eight or ten copies of "Kent's Commentaries."⁹ Neither would suitable clothing supplied in an unreasonable quantity.¹⁰

(e) They must be necessary to his *wants*. Hence an infant cannot bind himself for what are *prima facie* necessities where his wants are already supplied from some other source or he has a parent or guardian able and willing to provide for him.¹¹

¹ Tupper v. Caldwell, 12 Metc. 559; 46 Am. Dec. 704; Wallis v. Bardwell, 126 Mass. 336; West v. Gregg, 1 Grant's Cas. 53.

² New Hampshire, etc., Ins. Co., v. Noyes, 32 N. H. 345.

³ West v. Gregg, 1 Grant's Cas. 53; Magee v. Welsh, 18 Cal. 155; Bicknell v. Bicknell, 111 Mass. 285.

⁴ Askey v. Williams, 74 Tex. 224; State v. Weatherwax, 12 Kan. 463.

⁵ Barker v. Hubbard, 54 N. H. 539; 20 Am. Rep. 160.

⁶ Munson v. Washband, 31 Conn. 303; 83 Am. Dec. 151.

⁷ Phelps v. Worcester, 11 N. H. 51; Dillon v. Bowles, 8 Mo. App. 419. But see Epperson v. Nugent, 57 Miss. 45; 34 Am. Rep. 434.

⁸ Johnson v. Lines, 6 W. & S. 80;

Burghart v. Angerstein, 6 O. & P. 630; Nicholson v. Spencer, 11 Ga. 610.

⁹ Anson Contr. 112.

¹⁰ Johnson v. Lines, 6 W. & S. 80; 40 Am. Dec. 542.

¹¹ Walling v. Toll, 9 Johns. 141; Kline v. L'Amoureux, 2 Paige, 419; 22 Am. Dec. 652; McKanna v. Merry, 61 Ill. 177; Davis v. Caldwell, 12 Cush. 512; Hoyt v. Casey, 114 Mass. 339; 19 Am. Rep. 871; Angel v. McLellan, 16 Mass. 28; 8 Am. Dec. 118; Swift v. Bennett, 10 Cush. 436; Trainor v. Trumbull, 141 Mass. 527; Assignees of Hull v. Connolly, 13 McCord 6; 15 Am. Dec. 612; Edwards v. Higgins, 2 McCord, Ch. 16; Kraker v. Byrum, 13 Rich. L. 163; Guthrie v. Murphy, 4 Watts, 90; 28 Am. Dec. 681; Johnson v. Lines, 6 Watts & S. 80; 40 Am. Dec. 542; Smith v. Young, 2 Dev. &

Therefore one who trusts an infant does so at his peril and cannot recover for the price of articles furnished the infant on credit as necessities, if he was already sufficiently supplied.¹ It is consequently incumbent upon the tradesman before he gives credit to the infant to make inquiries as to whether the infant was not at the time suitably provided with the articles.² But the duty of the person supplying the infant with necessities to inquire as to whether or not the infant is already supplied with similar articles before he trusts him is not a rule of law which will protect such party, if notwithstanding a diligent inquiry without ascertaining that the infant has been supplied, it turns out after he furnishes the articles applied for that the infant was sufficiently provided. If the infant was already supplied as a fact, there can be no recovery for other goods supplied as necessities, whether the party knew of the fact or not at the time he gave credit to the infant.³ Where an infant lives with his father or even his mother, who may not be under the same obligation to support him as the father, or is under the care of a guardian, it is a very natural and reasonable presumption that he is properly supplied with necessities and he is therefore not liable for anything further in the absence of evidence to the contrary.⁴ If a parent or guardian has furnished the infant

B. 26; *Hussey v. Roundtree*, Bush. L. 110; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Elrod v. Myers*, 2 Head, 33; *Nichol v. Steger*, 2 Tenn. Ch. 328; 6 Lea, 393; *Decell v. Lowenthal*, 57 Miss. 331; 34 Am. Rep. 449.

¹ *Story v. Perry*, 4 Car. & P. 526; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607.

² *Ford v. Fothergill*, Peake N. P. 229; 1 Esp. 211; *Cook v. Deaton*, 3 Car. & P. 114; *Burghart v. Angerstein*, 6 Car. & P. 690; *Mortara v. Hall*, 6 Sim. 465, 466; *Steedman v. Rose*, Car. & M. 422;

Kline v. L'Amoureux, 2 Paige, 419; 22 Am. Dec. 652; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542.

³ *Brayshaw v. Eaton*, 7 Scott, 183; 5 Bing. N. O. 251; *Foster v. Redgrave*, L. R. 4 Ex. 85, note; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Trainer v. Trumbull*, 141 Mass. 527; *Nichol v. Stegel*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; and see *Ryder v. Wombwell*, L. R. 4 Ex. 32.

⁴ *Assignees of Hull v. Connolly*, 3 McCord, 6; 15 Am. Dec. 612; *Jones v. Colvin*, 1 McMull, L. 14; *Perrin v. Wilson*, 10 Mo. 451; *State v. Cook*, 12 Ired. L. 67; *Freeman v. Bridger*, 4 Jones, L. 1; 67 Am. Dec. 258; *Parsons v. Keys*, 43 Tex. 557.

with such articles as he regarded ample for the support of the infant according to his age and condition, or even if the infant has been furnished with money by his parent or guardian or by an allowance from the court, sufficient to supply him with necessities, the presumption is that he has been adequately and properly supplied, and one who seeks to charge the infant for necessities in addition has the burden of proving that such is not the fact.¹

§ 138. **Borrowing Money for Necessaries.** — An infant is not liable at law for money borrowed by him to pay for necessities although actually expended by him for that purpose, though he is liable for money directly applied by the lender in procuring necessities for him.² But in equity the infant is liable for money borrowed and actually applied by him for the payment of necessities.³ The reason why an infant is not liable at law for money borrowed by him to pay for necessities, although actually expended by him for that purpose, is usually stated to be that the lender, by intrusting the money to the infant, enables him to waste and misapply it, and his subsequent proper use of it could not confer an action where none existed, upon the contract of lending at the time of the loan. But perhaps the true reason why the lender cannot recover at law is the want of privity between the lender and the one who supplies the necessities.⁴

§ 139. **Express Contracts for Necessaries.** — Whether an infant is ever bound by his express contract with reference to the price or value of necessities furnished him has

¹ *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Rivers v. Gregg*, 5 Rich. Eq. 274.

² *Rearsby & Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio 460; *Smith v. Oliphant*, 2 Sand-

306; *Price v. Sanders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb. 519.

³ *Marlow v. Pittfield*, 1 P. Wms. 558; *Hickman v. Hall's Admrs.*, 5 Litt. 338; *Watson v. Cross*, 2 Duvall, 147; *Price v. Sanders*, 60 Ind. 310.

⁴ *Rivers v. Gregg*, 5 Rich. (Eq.) 274; *Bradley v. Pratt*, 23 Vt. 373.

been disputed. It is agreed, however, that he cannot be held for more than their reasonable value. He may bind himself to pay what they are reasonably worth, but not what he may foolishly have agreed to pay for them.¹ "He is held on a promise implied by law and not strictly speaking on his actual promise. The law implies the promise to pay from the necessity of his situation just as in the case of a lunatic. In other words he is liable to pay only what the necessities were reasonably worth and not what he may improvidently have agreed to pay for them."²

§ 140. *Securities given for Necessaries.* — It has been held in some cases that an infant cannot be charged on a special contract or security given for necessities, as for example a bill of exchange or promissory note,³ or an account stated,⁴ or a bond with a penalty,⁵ or a mortgage deed.⁶

These conclusions are based on the ground that the infant could not, if sued upon the security, show by parol the actual and real value of the consideration. It would therefore follow that if the form of the instrument be such as to preclude an inquiry into the consideration it could very well be held that no action could be maintained thereon against the defense of infancy. Consequently it would seem that no action could be maintained at common law against an infant on a bond or other sealed instrument executed by him for necessities. And the same would be true of an account stated, whose consideration cannot be inquired into. But where by statute the consideration of a bond

¹ *Locke v. Smith*, 41 N. H. 341.

² *Trainer v. Tumbull*, 141 Mass. 527.

³ *Williamson v. Watts*, 1 Camp. 552; *Morton v. Stewart*, 5 Ill. (App.) 533; *Fenton v. White*, 4 N. J. (L.) 100; *McCrellis v. Howe*, 3 N. H. 348; *McMinn v. Richmonds*, 6 Yerg. 9; *Swasey v. Vanderheyden*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *Dubose v. Wheddon*,

⁴ *McCord*, 221; *Aaron v. Harley*, 6 Rich. (L.) 26.

⁵ *Trueman v. Hurst*, 1 T. R. 40; *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 634.

⁶ *Lawson Rights*, Rem. & Pr., § 830; *Bliss v. Perryman*, 2 Ill. 434; *Hussey v. Jewett*, 9 Mass. 101.

⁷ *Id.*

may be inquired into, an action would lie on a bond given by an infant for necessities.¹

As to negotiable paper the better doctrine seems to be that an action can be maintained against an infant upon his negotiable paper given for necessities, either by the original payee or by any subsequent holder, and that the plaintiff may recover the full face of the paper or so much thereof as represents the reasonable value of the necessities; for infancy can be shown and the consideration of the paper be inquired into no matter who may be plaintiff.² In *Bradley v. Pratt*,³ Redfield, J., said: "I do not well comprehend why upon principle any express contract may not be said to be binding upon him, when it is shown to have been given for necessities and the price to have been reasonable, if it be one where the consideration may be inquired into. * * * And as confessedly the infant may *prima facie* avoid his note or bill by merely showing the fact of his infancy at the time of making the contract, what is the impropriety in allowing the plaintiff to recover in all such cases by showing the consideration to be for necessities."

✓ § 141. **Province of Judge and Jury.** — As to the province of judge and jury respectively in deciding the question of "necessaries" the rule is as follows: Evidence being given of the things supplied and the circumstances of the infant, the court determines whether the things supplied can reasonably be considered necessities at all; and if it comes to the conclusion that they cannot, the case may not even be submitted to the jury. If the judge conclude that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessities, he leaves it to the jury to say whether, under the circum-

¹ Guthrie v. Morris, 22 Ark. 411.

² Bradley v. Pratt, 23 Vt. 378; Earle v. Reed, 10 Met. 387; Dubose v. Wheddon, 4 McCord, 221; Aaron v. Harley, 6 Rich. L.

26; Askey v. Williams, 74 Tex. 294; Rainwater v. Durham, 2 Nott & McC. 524; 10 Am. Dec. 637.

³ 23 Vt. 378.

stances of the case, the things supplied were necessities as a fact. And the jury determines this point, taking into consideration the character of the things supplied, the extent to which the infant was already supplied with them, and the actual circumstances of the infant.¹ The rule is sometimes stated as follows: Whether the articles furnished are of a *name and quality* coming within the denomination of necessities is exclusively a question of law for the court, but the quantity, that is to say, to what extent the articles are necessary in the given case, is a question of fact for the jury.²

§ 142. **Ratification after Reaching Majority.**—An infant's voidable contract may be confirmed and ratified by him after he reaches his majority,³ and this may be done in three ways: 1. By an express ratification. 2. By an implied ratification from acts and conduct. 3. By omission to disaffirm the contract within a reasonable time after reaching majority.⁴

§ 143. **Express Ratification by New Promise.**—The infant on coming of age may bind himself by a new promise to perform the contract made by him during his infancy, and this it will be observed is an illustration of the limited class of cases in which a past consideration is allowed to support a subsequent promise.⁵ Where a new promise

¹ Beelor v. Young, 1 Bibb, 519; Saunders v. Ott, 1 McCord, 573; Smith v. Young, 2 Dev. & B. 26; Tupper v. Cadwell, 12 Met. 559; 46 Am. Dec. 704, 705; Merriam v. Cunningham, 11 Cush. 40; Davis v. Caldwell, 12 Cush. 512; Grace v. Hale, 2 Humph. 27; 36 Am. Dec. 296; Jordan v. Coffield, 70 N. C. 110; Henderson v. Fox, 5 Ind. 489; Garr v. Haskett, 86 Ind. 373; McKanna v. Merry, 61 Ill. 177; Decell v. Lewenthal, 57 Miss. 331; 34 Am. Rep. 449.

² Bent v. Manning, 10 Vt. 230; Strong v. Foote, 42 Conn. 203; Parsons v. Keyes, 48 Tex. 557; Stone v. Dennison,

13 Pick. 7; 1 Pars. Contr. 296; Anson Contr. 112, Knowlton's notes.

³ He can never ratify while his infancy continues for this would be giving him power to make a contract. Corey v. Burton, 32 Mich. 30; Bank of Silver Creek v. Browning, 16 Abb. Pr. 272.

⁴ Little v. Duncan, 9 Rich. (L.) 55; 64 Am. Dec. 760; Tobey v. Wood, 123 Mass. 88; 25 Am. Rep. 27; Norris v. Vance, 3 Rich. (L.) 164.

⁵ See *ante*, § 106; Conklin v. Ogborn, 7 Ind. 533; Jefford v. Ringgold, 6 Ala. 544; Ohandler v. Simmons, 97 Mass. 508; 33 Am. Dec. 117.

is relied upon as a ratification it must be made to the other party or his agent,¹ and a mere acknowledgment is not sufficient;² there must be a direct promise or the language used must show a willingness and intention to fulfill the contract.³

If the new promise is conditional it must be shown that the condition has been fulfilled.⁴ If the infant's new promise is that he will pay his debt "as soon as he is able," or, "as soon as he can" no action can be sustained against him by virtue of such new promise without proof of his ability to pay.⁵

The ratification being simply a waiver of the objection of infancy and not a new contract, may be verbal, although the contract ratified be a deed of conveyance, or an instrument under seal generally, or any contract required by law to be in writing.⁶ But in Arkansas, Kentucky, Maine, Mississippi, Missouri, South Carolina, Vir-

¹ *Goodsell v. Myers*, 3 Wend 479; *Bigelow v. Grannis*, 2 Hill, 120; *Chandler v. Grover*, 32 Pa. St. 509; *Holt v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Hodges v. Hunt*, 32 Barb. 180; *Mayer v. McLure*, 36 Miss. 389; 72 Am. Dec. 190.

² *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358; *Wilcox v. Roath*, 12 Conn. 550; *Catlin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249; *Bennett v. Collins*, 52 Conn. 1; *Martin v. Byrom*, Dud. (Ga.) 203; *Conklin v. Ogborn*, 7 Ind. 553; *Fetrow v. Wiseman*, 40 Ind. 148; *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28; *Martin v. Mayo*, 10 Mass. 137; 6 Am. Dec. 108; *Jackson v. Mayo*, 11 Mass. 230; *Ford v. Phillips*, 1 Pick. 202; *Barnaby v. Barnaby*, 1 Pick. 221; *Thompson v. Lay*, 4 Pick. 48; 16 Am. Dec. 325; *Peirce v. Tobey*, 5 Met. 168; *Smith v. Kelley*, 13 Met. 309; *Proctor v. Sears*, 4 Allen, 95; *Baker v. Kennett*, 54 Mo. 82; *Wright v. Steele*, 2 N. H. 51; *Hale v. Gerrish*, 8 N. H. 374; *Holt v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307; *New Hampshire Mut. L. Ins. Co. v. Noyes*, 32 N. H. 345; *Alexander v. Hutcheson*, 2 Hawks, 635; *Dunlap v. Hales*, 2

Jones (L.) 381; *Turner v. Gaitther*, 33 N. C. 357; 35 Am. Rep. 574; *Hinely v. Margartz*, 3 Pa. St. 428; *Chambers v. Wherry*, 1 Ball. L. 28; *Reed v. Basbears*, 4 Sneed. 118; *Hatch v. Hatch's Estate*, 60 Vt. 160.

³ *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358; *Minock v. Shortridge*, 21 Mich. 304; *Bennett v. Collins*, 52 Conn. 1; *Martin v. Byrom*, Dud. (Ga.) 203; *Ford v. Phillips*, 1 Pick. 202; *Dunlap v. Hales*, 2 Jones (L.) 381; *Hale v. Gerrish*, 8 N. H. 374.

⁴ *Everson v. Carpenter*, 17 Wend. 419; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Edgerly v. Shaw*, 25 N. H. 517; 57 Am. Dec. 349.

⁵ *Cole v. Saxby*, 3 Esp. 159; *Thompson v. Lay*, 4 Pick. 48; 16 Am. Dec. 325; *Proctor v. Sears*, 4 Allen, 95; *Everson v. Carpenter*, 17 Wend. 419; *Chandler v. Glover's Admr.*, 32 Pa. St. 509.

⁶ *Phillips v. Green*, 5 T. B. Mon. 344; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Jefford's Admr. v. Ringgold*, 6 Ala. 544; *West v. Penny*, 16 Ala. 187; *Vanghan v. Parr*, 20 Ark. 600; *Stokes v. Brown*, 4 Chand. 39; 3 Finney, 311.

ginia and West Virginia, a promise of this kind is unenforceable in every case unless in writing.¹ But these statutes apply simply to "new promises" and not to ratification by the other two means, viz.: by conduct and by failure to disaffirm.²

§ 144. Must be Made with Knowledge of Non-Liability.—The ratification by an express new promise must, in order to amount to a binding ratification, be made by the party with full knowledge that he is not legally liable under the contract.³

§ 145. Effect of Ratification.—A ratification once validly made of a contract entered into by the party while an infant is binding upon him, and cannot be recalled or disaffirmed,⁴ and it relates back to the time the contract was made and renders it valid from the beginning.⁵ But it must be made before suit brought in order that the action can be sustained against a plea of infancy.⁶

¹ Stimson Am. Stat. L. 4147.

² *Cornwall v. Hawkins*, 41 L. J. Ch. 435, construing the similar English statute (Lord Tenterden's act); *Robinson v. Hoskins*, 14 Barb. 893.

³ *Harmer v. Killing*, 5 Esp. 102; *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead. Cas. 224; *Curtin v. Patton*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Pa. St. 428; *Alexander v. Hutchinson*, 2 Hawks, 535; *Dunlap v. Hales*, 2 Jones (L.) 381; *Turner v. Galtner*, 83 N. C. 357; 35 Am. Rep. 574; *Scott v. Buchanan*, 11 Humph. 468; *Reed v. Bashears*, 4 Sneed, 118; *Norris v. Vance*, 3 Rich. (L.) 164; *Petty v. Roberts*, 7 Bush, 410; *Fetrow v. Wiseman*, 40 Ind. 148; *Baker v. Kennett*, 54 Mo. 82; *Owen v. Long*, 112 Mass. 403; *Eureka Co. v. Edwards*, 71 Ala. 248; *Flexner v. Dickerson*, 72 Ala. 318; *Hatch v. Hatch's Estate*, 60 Vt. 180. A few cases, however, hold that it is not necessary to a valid ratification that the party should know that he is not legally liable by reason of his infancy. *Morse v. Wheeler*, 4 Allen, 570;

Anderson v. Soward, 40 Ohio St. 325; 48 Am. Rep. 687; *Ring v. Jamison*, 66 Mo. 424; *Clark v. Vancourt*, 100 Ind. 118; 50 Am. Rep. 774.

⁴ *Derrick v. Kennedy*, 4 Port. 41; *McCarthy v. Nicrosi*, 72 Ala. 832; 47 Am. Rep. 418; *Voltz v. Voltz*, 75 Ala. 555; *Hastings v. Dollarhide*, 24 Cal. 195; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

⁵ *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Reed v. Batchelder*, 1 Met. 559; *West v. Penny*, 16 Ala. 187; *McCormic v. Leggett*, 8 Jones (L.) 425; *Palmer v. Miller*, 25 Barb. 399; *Hall v. Jones*, 21 Md. 489; *Minock v. Shortridge*, 21 Mich. 304.

⁶ *Thornton v. Ilingsworth*, 2 Barn. & C. 824; 4 Dowl. & R. 545; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Ford v. Phillips*, 1 Pick. 202; *Freeman v. Nichols*, 138 Mass. 313; *Merriam v. Wilkins*, 6 N. H. 432; 25 Am. Dec. 472; *Hall v. Gerrieh*, 8 N. H. 374; *Aldrich v. Grimes*, 10 N. H. 194; *Martin v. Byrom*, Dud. (Ga.) 203.

Suit should be brought on the old promise or contract, and if infancy is set up in defense the plaintiff should reply the ratification. This is the proper method of pleading when a contract made during infancy is subsequently ratified, although some of the cases intimate that the plaintiff might, in case the defendant had made a new promise after coming of age, declare on the new promise.¹

§ 146. **Implied Ratification from Acts and Conduct.** — If the infant after reaching his majority accepts the consideration of his contract made during his infancy, his ratification of it will be implied, as where he has made a lease during his minority and accepts rent after reaching full age,² or receives interest under his agreement,³ or accepts the purchase price of property sold by him,⁴ or receives a portion of the consideration for a mortgage of his property,⁵ or receives the proceeds of an award, pursuant to a submission of his claim to arbitration.⁶ So bringing suit on the contract after coming of age is an implied ratification,⁷ or retaining either real or personal property purchased by him during infancy for an unreasonable time after coming of age,⁸ or selling or conveying the property to a third person.⁹

¹ *Hunt v. Massey*, 5 Barn. & Adol. 902; *West v. Penny*, 16 Ala. 187; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Watkins v. Stevens*, 4 Barb. 168; *Hodges v. Hunt*, 22 Barb. 150.

² *Ashfield v. Ashfield*, W. Jones, 157; *Latch*, 199; *Godb.* 364; *Smith v. Low*, 1 Atk. 489; *Slator v. Trimble*, 14 Ir. C. L. 342.

³ *Franklin v. Thornebury*, 1 Vern. 132.

⁴ *Ferguson v. Bell's Admr.*, 17 Mo. 347; *Doe ex dem. McCormic v. Leggett*, 8 Jones (L.) 425, 427; *Highley v. Barron*, 49 Mo. 103.

⁵ *Keegan v. Cox*, 116 Mass. 289.

⁶ *Jones v. Phoenix Bk.*, 8 N. Y. 228.

⁷ *Middleton v. Hoge*, 5 Bush. 478.

⁸ *Boyden v. Boyden*, 9 Met. 519; *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617; *Alexander v. Heriot*, Ball. Eq.

228; *Eubanks v. Peak*, 2 Ball. (L.) 497; *Thomasson v. Boyd*, 13 Ala. 419; *Aldrich v. Grimes*, 10 N. H. 194; *McKamy v. Cooper*, 81 Ga. 679; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Brady v. McKenny*, 23 Me. 517; *Baker v. Kennett*, 54 Mo. 82; *Henry v. Root*, 23 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654; *Callis v. Day*, 38 Wis. 643; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8; *Armfield v. Tate*, 7 Ired. (L.) 238; *Middleton v. Hoge*, 5 Bush. 478; *Imley v. Padgett*, 27 S. C. 300; *Langdon v. Clayton*, 75 Mich. 204.

⁹ *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Williams v. Brown*, 34 Me. 594; *Deason v. Boyd*, 1 Dana, 45; *Robinson v. Haskins*, 14 Bush. 393; *Shropshire v. Burns*, 46 Ala. 108;

§ 147. **Disaffirmance Before Reaching Majority.** — An infant's personal contracts, whether executed or executory, may be disaffirmed by him either before or after he reaches his majority,¹ as for example, his sales or exchanges of personal property,² his purchases of chattels,³ his chattel mortgages,⁴ his contracts of service⁵ or of partnership.⁶

But an infant's conveyance of realty cannot be conclusively avoided by him until he reaches full age, although it seems he may enter during his minority and enjoy the profits.⁷ The reason which permits the infant to disaffirm his contracts of a personal nature and those relating to personal property during his minority does not apply at least under ordinary circumstances to his deeds of conveyance. He is amply protected while his infancy lasts by his right to enter and take the profits.

But though in some cases, as we have seen, an infant's contract may be avoided by him during his minority, it is never imperative, but simply a privilege which the law

Minock v. Shortridge, 21 Mich. 304; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Combs*, 6 Me. 89; 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654; *Williams v. Mabree*, 7 N. J. Eq. 509; *Middleton v. Hoge*, 5 Bush, 478; *Johnston v. Farnier*, 69 Pa. St. 449; *Thomas v. Pullis*, 56 Mo. 211; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; *Buchanan v. Hubbard*, 119 Ind. 187.

¹ *Dixon v. Merritt*, 21 Minn. 196; *Chapin v. Shafer*, 49 N. Y. 407; *Walker v. Ellis*, 19 Ill. 470; *Mustard v. Wohlford*, 15 Gratt. 529.

² *Shipman v. Horton*, 17 Conn. 481; *Chapin v. Shafer*, 49 N. Y. 407; *Carr v. Clough*, 26 N. H. 290; 59 Am. Dec. 345; *Towle v. Dresser*, 73 Me. 253; *Stafford v. Roof*, 9 Cow. 628; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Bailey v. Barnberger*, 11 B. Mon. 113; *Carpenter v. Carpenter*, 45 Ind. 142; *Bloomington v. Chittenden*, 74 Mich. 698.

³ *Cogley v. Cushman*, 16 Minn. 397; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep.

53; *Riley v. Mallory*, 33 Conn. 201; *Indianapolis Chair Manfg. Co. v. Wilcox*, 59 Ind. 429.

⁴ *State v. Plaisted*, 43 N. H. 413; *Cogley v. Cushman*, 16 Minn. 397; *Chapin v. Shafer*, 49 N. Y. 407; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407.

⁵ *Vent v. Osgood*, 19 Pick. 572; *Ray v. Hames*, 52 Ill. 485; *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777.

⁶ *Adam v. Buell*, 67 Md. 53; 1 Am. St. Rep. 379.

⁷ *Zouch v. Parsons*, 3 Burr. 1794; *Stafford v. Roof*, 9 Cow. 628; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Matthewson v. Johnson*, 1 Hoff. Ch. 560; *Cummings v. Powell*, 8 Tex. 80; *Kilgore v. Jordan*, 17 Tex. 341; *Chapman v. Chapman*, 13 Ind. 396; *Welch v. Bunce*, 83 Ind. 382; *Irvine v. Irvine*, 5 Minn. 61; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Doc ex dem. McCormick v. Leggett*, 8 Jones. (L.) 423; *Hastings v. Dollarhide*, 24 Cal. 195; *McCarthy v. Nicrosi*, 72 Ala. 383; 47 Am. Rep. 418; *Singer Manf. Co. v. Lamb*, 81 Mo. 221.

gives him for his protection at his pleasure. After he becomes of age he may repudiate as well as confirm any of his contracts made during his minority.

§ 148. **The Right to Disaffirm.**—The infant's right to disaffirm his contracts is an absolute right paramount to all equities of other parties. Hence a purchaser of personal property from the vendee of an infant although a purchaser for value and without notice cannot hold the property as against the infant who chooses to rescind his contract of sale.¹ Nor is a *bona fide* holder of a negotiable instrument for value before maturity and without notice, protected against the plea of infancy.² And an infant may avoid his deed of conveyance or executory contract to convey real property as against a subsequent *bona fide* purchaser from his grantee or vendee for value, and without notice of the fact of infancy.³ The disaffirmance of his contract is not a fraudulent act which will avoid it or render the infant liable at law as for fraud, or against which a court of equity will relieve on that ground.⁴ For although in one sense it is always a wrong and an injury for a person laboring under a disability to enter into a contract and enjoy its fruits and thereafter to repudiate it to the prejudice of the other party; yet legal fraud cannot be predicated of such conduct by a minor where it has not been marked by any element of deceit or intentional wrong, because the right of disaffirmance is the privilege which the law attaches to the condition of disability, and of this right all men are bound to take notice.⁵

¹ Hill v. Anderson, 5 Sm. & M. 216.

² Howard v. Simpkins, 70 Ga. 322; Tiedeman on Commercial Paper, § 280.

³ Mustard v. Wohlford's Heirs, 15 Gratt. 329; 76 Am. Dec. 209; Harrod v. Myers, 21 Ark. 592; 76 Am. Dec. 409; Jenkins v. Jenkins, 12 Iowa, 195; Mills v. Lingerman, 24 Ind. 385; Sims v. Smith, 86 Ind. 577; Buchanan v. Hubbard, 96 Ind. 1; Brantley v. Wolf, 60 Miss. 420;

McMorris v. Webb, 17 S. C. 558; 43 Am. Rep. 629.

⁴ Tucker v. Moreland, 10 Pet. 59; 1 Am. Lead. Cas. 224, 234; Clamorgan v. Lane, 9 Mo. 442; Huth v. Carondelet, etc., R. Co., 56 Mo. 202; Burns v. Hill, 19 Ga. 22; Seabrook v. Gregg, 2 S. C. 68; Brantley v. Wolf, 60 Miss. 420.

⁵ Brantley v. Wolf, 60 Miss. 420.

§ 149. **Disaffirmance must be In Toto.**— A disaffirmance or a ratification by the infant must be *in toto*: if he disaffirms or ratifies a part of the agreement he disaffirms or ratifies it all.¹ An infant who purchases lands or chattels cannot on coming of age retain the property and repudiate his note given for the price or other agreement upon which he obtained the property.² Where an infant purchases land or chattels and gives back a mortgage thereon to secure the price, the conveyance or transfer and the mortgage constitute but one transaction and the infant cannot avoid the mortgage without also avoiding the conveyance or transfer, or in other words he cannot repudiate the one and affirm the other; and if after coming of age he ratifies the purchase, he thereby necessarily ratifies the mortgage.³

§ 150. **Form of Disaffirmance.**— It is not essential that the infant should expressly disaffirm his contract, it being enough that he does some positive act inconsistent with it and from which his intention not to be bound by it may be implied;⁴ and therefore any act on his part unequivocally manifesting his intention to disaffirm his contract will be sufficient. Some early cases hold that deeds operating under the statute of uses and statutory grants executed by infants must be disaffirmed by entry or some other act

¹ *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Heath v. West*, 28 N. H. 108; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 372; *Weed v. Beebe*, 21 Vt. 495; *Hubbard v. Cummings*, 1 Me. 11; *Lowry v. Drake*, 1 Dana, 46; *Skinner v. Maxwell*, 66 N. C. 45; *Cogley v. Cushman*, 16 Minn. 402; *Young v. McKee*, 13 Mich. 556; *Overbach v. Heermance*, 1 Hopk. Ch. 337; 14 Am. Dec. 548.

² *Kitchen v. Lee*, 11 Paige, 107; 42 Am. Dec. 101; *Henry v. Root*, 33 N. Y. 526; *Weed v. Beebe*, 21 Vt. 495; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Armfield v. Tate*, 7 Ired. (L.) 258; *Bennett v. McLaughlin*, 13 Ill. App. 349.

³ *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Heath v. West*, 28 N. H. 101; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 59; 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Ottman v. Moak*, 3 Sand. Ch. 431; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Richardson v. Bright*, 9 Vt. 368; *Young v. McKee*, 13 Mich. 552; *Curtiss v. McDougal*, 26 Ohio St. 66; *Callis v. Day*, 28 Wis. 643; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; *Betts v. Carroll*, 6 Mo. App. 578.

⁴ *Mustard v. Wohlford*, 15 Gratt. 329; 76 Am. Dec. 209; *Illinois Land Co. v. Beem*, 2 Ill. App. 390; *Roberts v. Wiggin*, 1 N. H. 8; 78 Am. Dec. 38; *Dixon v. Merritt*, 21 Minn. 196.

of equal notoriety with the original conveyance; a re-entry, however, not being indispensable as in case of feoffments.¹ The better opinion, however, is that any act of the infant unequivocally manifesting an intention to disaffirm his deed or contract, is sufficient.² In *Singer Mfg. Co. v. Lamb*,³ Martin, C., says: "The ancient doctrine which required the disaffirming act to be of as high and solemn a character as the act disaffirmed has no place in modern law. The disaffirming act need take no particular form or expression. The deed of a minor may be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument."

A distinction has been made between the nature of the acts which are sufficient to ratify an infant's deed or other contract and those which are required to disaffirm it. "There is," says Strong, J., in *Irvine v. Irvine*,⁴ "a well recognized distinction between the nature of those acts which are necessary to avoid an infant's deed and the character of those that are sufficient to confirm it. * * * There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to the grantee. Now if the deed be avoided the ownership of the land is transferred. The seisin is changed. There is fitness in a rule that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand a confirmation passes no title; it affects no change of property; it disturbs no seisin. It is therefore itself an act of a character less solemn than

¹ *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 286; *Voorhies v. Voorhies*, 24 Barb. 180; *Dominick v. Michael*, 4 Sand. 374.

² *Drake's Lessee v. Ramsay*, 5 Ohio, 251; *White v. Flora*, 2 Over. 426; *State v. Plaisted*, 43 N. H. 413; *Cogley v. Cushman*, 16 Minn. 397; *Chapin v. Shafer*, 49 N. H. 407; *Long v. Williams*, 74 Ind.

115; *Allen v. Poole*, 54 Miss. 323; *McCarthy v. Nicross*, 73 Ala. 332; 47 Am. Rep. 418; *Singer Manfr. Co. v. Lamb*, 81 Mo. 221; *Bagley v. Fletcher*, 44 Ark. 153.

³ 81 Mo. 225.

⁴ 9 Wall, 617.

is the act of avoiding a deed, and it may well be effected in a less formal manner."

§ 151. **Same — Implied Disaffirmance.** — Therefore the following acts on the part of the infant have been held to show a disaffirmance, viz., a sale of personal property to one person previously mortgaged by him to another,¹ his execution of a second mortgage deed or lease of property previously mortgaged, conveyed or leased to another,² his institution after coming of age of an action to recover possession of the land personally conveyed by him,³ or his plea of infancy to a suit to enforce a contract made during infancy.⁴

¹ *State v. Plaisted*, 43 N. H. 418; *State v. Howard*, 88 N. C. 650; *Chapin v. Shafer*, 49 N. Y. 407.

² *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead. Cas. 224; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Den ex dem. Hayes v. Stowe*, 2 Dev. & B. 320; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Harris v. Cannon*, 6 Ga. 382; *Pitcher v. Laycock*, 7 Ind. 398; *Riggs v. Flisk*, 64 Ind. 100; *Long v. Williams*, 74 Ind. 115; *Losey v. Bond*, 94 Ind. 67; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 563; *McGan v. Marshall*, 7 Humph. 121; *Youse v. Norcoms*, 12 Mo. 549; 51 Am. Dec. 175; *Norcum v. Sheahan*, 21 Mo. 25; 64 Am. Dec. 214; *Peterson v. Lalk*, 24 Mo. 541; 69 Am. Dec. 441; *Hastings v. Dollarhide*, 24 Cal. 195; *Dawson v. Holmes*, 30 Minn. 107; *Bagley v. Fletcher*, 44 Ark. 153; *Haynes v. Burnett*, 53 Mich. 15; *Corbett v. Spencer*, 63 Mich. 731; *Vallandingham v. Johnson*, 65 Ky. 288. But if the execution of the second instrument is consistent with the continued existence of the first there is no disaffirmance and it remains unaffected by it. *Singer Manfg. Co. v. Lamb*, 81 Mo. 221; *Leitensdorfer v. Hempstead*, 18 Mo. 269; *Eagle Fire Co. v. Lent*, 6 Page, 635; 1 Edsw. Ch. 301; *Stuart v. Baker*, 17 Tex. 417; *McGain v. Marshall*, 7 Humph. 121; *Allen v. Poole*, 54 Miss. 323. And whether the second amounts to a disaffirmance of the first is

a question for the court and not one for the jury. *Peterson v. Lalk*, 24 Mo. 541; 69 Am. Dec. 441. Thus a deed which purports to convey the grantor's right and interest in any lands in a certain town not theretofore conveyed by the grantor, does not embrace lands sold by the grantor during her infancy. *Phillips v. Green*, 3 A. K. Marsh, 7; 13 Am. Dec. 124. And where a minor conveyed her interest in a tract of land and afterwards acquired another interest by inheritance a deed subsequently executed by her after majority conveying simply her right, title and interest in the tract, did not avoid the prior deed. *Leitensdorfer v. Hempstead*, 18 Mo. 269.

³ *Drake v. Rainey*, 5 Ohio, 251; *Hughes v. Watson*, 10 Ohio, 127; *Hoyle v. Stowe*, 2 Dev. & B. 320; *Chadbourn v. Rackliff*, 30 Me. 354; *Webb v. Hall*, 35 Me. 336; *Cole v. Pennoyer*, 14 Ill. 158; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Harris v. Ross*, 86 Mo. 89; 56 Am. Rep. 411; *Clark v. Tate*, 7 Mont. 171; *Craig v. Van Bibber*, 100 Mo. 584; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Haynes v. Bennett*, 53 Mich. 15; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Schaffer v. Larretta*, 58 Ala. 14; *Bedinger v. Wharton*, 27 Gratt. 857; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Tunison v. Chamblin*, 88 Ill. 378.

⁴ *Strain v. Wright*, 7 Ga. 568; *Freeman v. Nichols*, 138 Mass. 313; *Shrock v. Crowl*, 83 Ind. 243; *Sparr v. Florida S. R. Co.*, 25 Fla. 185.

§ 152. **When Disaffirmance Required — Lapse of Time.**— Some contracts are binding upon the infant unless expressly or impliedly disaffirmed; others are not binding on him unless expressly or impliedly ratified. The rule seems that where an infant acquires an interest in *permanent property* to which obligations attach, or enters into a contract which involves *continuous rights and duties*, benefits and liabilities, and has taken benefits under the contract, he will be bound unless he expressly disclaims the contract. On the other hand, a promise to perform some *isolated act*, or a *contract wholly executory*, will not be binding upon the infant unless he expressly ratifies it upon coming of age.¹

Thus if an infant who has purchased chattels continues to hold them for an unreasonable time after coming of age, without any act of disaffirmance, he will be bound by his contract, for his act is of itself inconsistent with any other idea than that of ownership.² So if an infant purchases and takes a conveyance of real property, or makes an exchange of lands, or enters into an agreement to purchase lands and goes into possession, he must for like reasons elect to disaffirm within a reasonable time after attaining full age, or he will be held to have ratified the transaction by his acquiescence.³

¹ *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *State v. Rosseau*, 94 N. C. 335; *Boody v. McKenney*, 23 Me. 517; *Beardsley v. Hotchkiss*, 96 N. Y. 201.

² *Boyden v. Boyden*, 9 Metc. 519; *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617; *Alexander v. Heriot*, Bail. (Eq.) 223; *Thomasson v. Boyd*, 13 Ala. 419; *Aldrich v. Grimes*, 10 N. H. 194; *McKamy v. Cooper*, 81 Ga. 679; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Eubanks v. Peak*, 2 Ball. (L.) 437; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Boody v. McKenney*, 23 Me. 517; *Williams v. Brown*, 34 Me. 594; *Deason v. Boyd*, 1 Dana, 45; *Robinson v. Hoskins*, 14 Bush, 393; *Shropshire v. Burns*, 46 Ala. 106; *Minock v. Shortridge*, 21 Mich. 304.

³ *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Boody v. McKenney*, 23 Me. 517; *Baker v. Kennett*, 54 Mo. 82; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654; *Callis v. Day*, 38 Wis. 643; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8; *Evelyn v. Chichester*, 3 Burr. 1717; *Armfield v. Tate*, 7 Ired. (L.) 258; *Middleton v. Hoge*, 5 Bush. 478. What is a reasonable time depends upon the circumstance of each case. *Jenkins v. Jenkins*, 12 Ia. 195; *Stout v. Merrill*, 35 Ia. 47; *Green v. Wilding*, 59 Ia. 679; 44 Am. Rep. 696; A delay of two years has been held unreasonable. *Wright v. Germain*, 21 Ia. 535. So has four months. *Stout v. Merrill*, *supra*.

And it is held that stockholders who become possessed of their shares during infancy are liable for calls which accrued while they were infants, the court saying: "They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but in truth, they are purchasers who have acquired an interest, *not in a mere chattel, but in a subject of a permanent nature*, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have *elected to waive or disagree the purchase altogether*, either during infancy or at full age, at either of which times it is competent for an infant to do so."¹ On the same principle, where an infant held himself out as a partner, until he came of age, and then though ceasing to act as partner did nothing to disaffirm the partnership he was held liable for debts which accrued after he became of age. "The infant," said the court, "by holding himself out as a partner, contracted a continual obligation and that obligation remains till he thinks proper to put an end to it. * * * If he wished to be understood as no longer continuing a partner, he ought to have notified it to the world."²

In regard to conveyances of land made by an infant it is well settled that one holding lands under an infant's deed has a good title, subject to be defeated only by the infant's

¹ North Western, etc., R. Co. v. McMahon, 5 Ex. 114; Cork, etc., R. Co. v. Casenove, 10 Q. B. 735; Leeds, etc., R. Co.

v. Fearnley, 4 Ex. 26; Dublin R. Co. v. Black, 8 Ex. 181.

² Goode v. Harrison, 5 B. & Ald. 159.

disaffirmance of the deed.¹ Disaffirmance of the deed must be made within a reasonable time after the infant reaches his majority; but what is a reasonable time, and whether there is any limit other than the statute of limitations, is a question upon which the authorities are in conflict. In some States it is laid down that the infant must avoid a deed of his lands within a reasonable time after attaining his majority or he will be bound by his acquiescence.² But the majority of the decisions on this question are to the effect that the infant is not barred by *mere acquiescence* for a shorter period than that prescribed by the statute of limitations.³

¹ Haynes v. Bennett, 53 Mich. 15; Green v. Green, 69 N. Y. 553; Irvine v. Irvine, 9 Wall. 617; Scranton v. Stewart, 52 Ind. 68; Goodnow v. Empire Lumber Co., 31 Minn. 468; Veal v. Fortson, 57 Tex. 462; Illinois, etc., v. Bonner, 75 Ill. 515.

² Hastings v. Dollarhide, 24 Cal. 195; Kline v. Beebe, 6 Conn. 494; Wallace's Lessee v. Lewis, 4 Harr. (Del.) 75; Nathans v. Arkwright, 69 Ga. 179; Cole v. Pennoyer, 14 Ill. 158; Blankenship v. Stout, 25 Ill. 132; Illinois Land & Loan Co. v. Brimer, 75 Ill. 815; Keil v. Healy, 84 Ill. 104; 25 Am. Rep. 434; Tunison v. Chamblin, 88 Ill. 378; Scranton v. Stewart, 52 Ind. 68; Long v. Williams, 74 Ind. 115; Wiley v. Wilson, 75 Ind. 596; Stringer v. North West. Mut. L. Ins. Co., 82 Ind. 100; Sims v. Bardoner, 86 Ind. 87; 44 Am. Rep. 263; Richardson v. Pate, 93 Ind. 423; 47 Am. Rep. 374; Goodnow v. Empire Lumber Co., 31 Minn. 468; 47 Am. Rep. 798; O'Brien v. Gaslin, 20 Neb. 347; Ward v. Lavery, 19 Neb. 429; Scott v. Buchanan, 11 Humph. 468; Matherson v. Davis, 2 Cald. 443; Bingham v. Barley, 55 Tex. 281; 40 Am. Rep. 301; Ferguson v. Houston, etc., R. Co., 73 Tex. 344; Askey v. Williams, 74 Tex. 294; Bigelow v. Kinney, 3 Vt. 333; 21 Am. Dec. 539; Richardson v. Borlight, 9 Vt. 368; Doe ex dem. Moore v. Abernathy, 7 Blackf. 442.

³ Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236; 85 Am. Rep. 318; Prout v. Wiley, 28 Mich. 164;

Baker v. Kennett, 54 Mo. 82; Heeth v. Car. Mar. and Dock Co., 56 Md. 207; Goodnow v. Empire Lumb. Co., 31 Minn. 468; 47 Am. Rep. 798; Richardson v. Pate, 93 Ind. 423; Wells v. Seixas, 24 Fed. Rep. 82; Bingham v. Barley, 55 Tex. 281; Sims v. Everhardt, 102 U. S. 300; Tucker v. Moreland, 10 Pet. 59; 1 Am. Lead. Cas. 224; Irvine v. Irvine, 9 Wall. 617; Wells v. Seixas, 24 Fed. Rep. 82; Eureka Co. v. Edwards, 71 Ala. 248; McCarthy v. Nicrossi, 72 Ala. 332; 47 Am. Rep. 418; Kountz v. Davis, 34 Ark. 590; Steele v. Harris, 51 Ark. 294; Haffert v. Miller, 86 Ky. 572; Boody v. McKenney, 23 Me. 517; Wallace v. Latham, 52 Miss. 291; Allen v. Poole, 54 Miss. 323; Peterson v. Laik, 24 Mo. 541; 69 Am. Dec. 441; Huth v. Carondelet Marine R. Co., 56 Mo. 202; Thomas v. Pullis, 56 Mo. 211; Wallace v. Carpenter, 11 Johns. 539; Voorhies v. Voorhies, 24 Barb. 150; Green v. Green, 69 N. Y. 553; 25 Am. Rep. 233; Hoyle v. Stowe, 2 Dev. & B. 320; Drake v. Ramsey, 5 Ohio, 251; Hughes v. Watson, 10 Ohio, 127; Cresinger v. Welch, 15 Ohio, 156; 45 Am. Dec. 565; Urban v. Grimes, 2 Grant's Cas. 96; Birch v. Linton, 78 Va. 584; 49 Am. Rep. 381; Gillespie v. Bailey, 12 W. Va. 70; 29 Am. Rep. 445; Schaffer v. Lorretta, 57 Ala. 14; Bozeman v. Browning, 31 Ark. 364; Bagley v. Fletcher, 44 Ark. 153; Petty v. Roberts, 7 Bush. 410; Brantley v. Wolf, 60 Miss. 420; Jones v. Butler, 30 Barb. 641; Wilson v. Branch, 77 Va. 65; 46 Am. Rep. 709. For lapse of time taken in connection with either

§ 153. **Effect of Disaffirmance.**—The disaffirmance of a contract by a minor annuls or renders it void on both sides *ab initio*.¹ Therefore if a grantor disaffirms a deed executed during infancy the conveyance being rendered void *ab initio* he is entitled to charge the grantee for rents during the entire time that he occupied the land, claiming under the deed.² If the possession of his real estate has passed from him, the title is revested in him by the disaffirmance and he can without any doubt recover the land if it is still in the hands of the party who contracted with him, and if it has been transferred even to a *bona fide* purchaser for value he may, as we have seen, still recover it. If he sells his real property but has retained possession, no affirmative action on his part is, of course, required. If he sells and delivers his personal property the title is likewise revested in him on disaffirming the contract, and he is entitled to the property in whosoever hands it may be and may retake the same and may maintain an action of replevin or trover for it.³

Where services have been performed by a minor in partial or entire execution of an express contract, and he avoids it, he may recover on an implied promise the value of the services rendered.⁴

If the infant has received no benefit from the contract he may on disaffirming it recover back any money which he

circumstances, as retention of the consideration by the grantor after coming of age, standing by and seeing improvements made upon the land, and the like, may amount to a ratification or estop the grantor from avoiding the deed. *Irvine v. Irvine*, 9 Wall. 617; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Print v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Mich. 291; *Allen v. Poole*, 54 Miss. 323; *Thomas v. Pullis*, 56 Mo. 211; *Drake v. Ramsay*, 5 Ohio, 251; *Cresinger v. Welch*, 15 Ohio, 156; 45 Am. Dec. 566; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

¹ *Boyden v. Boyden*, 9 Met. 519; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *French v. McAndrew*, 61 Miss. 187; *Shrock v. Crowl*, 83 Ind. 243; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; *Hoyt v. Wilkinson*, 57 Vt. 404.

² *French v. McAndrew*, 61 Miss. 187.

³ *Shipman v. Horton*, 17 Conn. 481; *Bailey v. Barnberger*, 11 B. Mon. 113; *Towle v. Dresser*, 73 Me. 252; *Bloomington v. Chilton*, 74 Mich. 698.

⁴ *Gaffney v. Hayden*, 110 Mass. 137; *Whitmarsh v. Hall*, 3 Denio, 375; *Derocher v. Continental Mills*, 58 Me. 217; *Vehue v. Pinkham*, 60 Me. 142; *Ray v. Haines*, 52 Ill. 485.

may have paid, and he has the same right when he restores or offers to restore property obtained by him by virtue of the contract,¹ and even here restoration is not necessary if the property has been taken from him either by the vendor or some third person.²

If a minor avoids a contract on which he has received money or property he is bound to restore it if it is in his power to do so.³ But where he has during minority wasted or squandered it, he is not required to return an equivalent. If it were so, the privilege would fail to protect him when most needed. It is to guard against the improvidence which is incident to his immaturity that this privilege is allowed.⁴

§ 154. Plea of Infancy Personal to Infant. — Infancy is a personal privilege of which no one is permitted to take advantage except the infant himself,⁵ and hence it is well

¹ *McCarthy v. Henderson*, 138 Mass. 310; *Robinson v. Weeks*, 56 Me. 102; *Shurtleff v. Millard*, 12 R. I. 272; 34 Am. Rep. 640; *Ruchizky v. DeHaven*, 97 Pa. St. 202; *Riley v. Mallory*, 33 Conn. 201; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; *Sparman v. Keim*, 83 N. Y. 245; *Heath v. Stevens*, 48 N. H. 251.

² *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Lemmon v. Beeman*, 45 Ohio St. 505.

³ *Brandon v. Brown*, 106 Ill. 519; *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Lemmon v. Beeman*, 45 Ohio St. 505; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Price v. Furman*, 27 Vt. 288; 65 Am. Dec. 191; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Green v. Green*, 69 N. Y. 553; 25 Am. Dec. 233; *Hangen v. Hachmeister*, 17 Jones & S. 34; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; *St. Louis, etc., R. Co. v. Higgins*, 44 Ark. 293; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Craig v. Van Bibber*, 100 Mo. 584; *Carey v. Burton*, 32 Mich. 80; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

⁴ *Chandler v. Simmons*, 97 Mass. 508; *Green v. Green*, 69 N. Y. 553;

Reynolds v. McCurry, 100 Ill. 356; and see cases cited in last note. Cases may be found in the books where it is laid down on the one side that an infant cannot avoid his contract and recover back his money or property without offering to restore the consideration which he received, and on the other hand that the infant may disaffirm and recover back without any condition as to restoring the consideration received by him. See the cases collected in note in 18 Am. St. Rep. 587-674. Neither of these rules can stand with the law as laid down in the text; the former seems to be too harsh, the latter too lax, and it is believed that the statement of the law as given in the text is not only just and equitable but supported by the best considered of the adjudications on the question.

⁵ *Shropshire v. Burns*, 46 Ala. 108; *Hastings v. Dollarhide*, 24 Cal. 195; *Frazier v. Massey*, 14 Ind. 382; *Schrock v. Crowl*, 83 Ind. 243; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Beeler v. Bultitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; *Hardy v. Waters*, 38 Me. 450; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Nightingale v. Withington*, 15 Mass. 272;

settled that a stranger to the contract cannot assert that it is not binding because entered into by an infant.¹ Therefore the maker of a promissory note cannot avoid payment to the indorsee on the ground that the indorser is a minor.² So in an action against a defendant for enticing away the plaintiff's servant, it is no defense that the contract of service was not binding because the servant was an infant.³ And a conveyance, mortgage, assignment or other transfer of property by an infant cannot be attacked as invalid because of infancy by his creditors.⁴

In case of the minor's death, insanity, or other disability rendering him incapable of exercising the right of election, such contract may be avoided or confirmed by his heirs,⁵ personal representative,⁶ or conservator.⁷ But the guardian

8 Am. Dec. 101; *Hill v. Keyes*, 10 Allen, 258; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 258; *Voorhees v. Watt*, 15 N. J. (L.) 343; *Patterson v. Lippincott*, 47 N. J. (L.) 457; *Inhabitants of Borden-town v. Wallace*, 50 N. J. (L.) 13; *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; *Mason v. Denison*, 15 Wend. 64; *Parker v. Baker*, 1 Clarke Ch. 136; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Slocum v. Hooker*, 1 Barb. 536; *Jones v. Butler*, 30 Barb. 641; *Hesser v. Steiner*, 5 Watts & S. 476; *Kuns's Exrs. v. Young*, 24 Pa. St. 60; *McGill v. Woodward*, 3 Brev. 401; *White v. Flora*, 2 Over. 426; *Harris v. Musgrove*, 59 Tex. 401; *Wamsley v. Lindenberger*, 2 Rand. 478.

¹ *Baldwin v. Rosier*, 1 McCrary, 384; *Babcock v. Bowman*, 8 Ind. 110; *Trustees of LaGrange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; *Ridgeley v. Crandall*, 4 Md. 435; *Thompson v. Hamilton*, 12 Pick. 423; 23 Am. Dec. 619; *Kendall v. Lawrence*, 22 Pick. 540; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111; *Mansfield v. Gordon*, 144 Mass. 168; *Soper v. Fry*, 37 Mich. 236; *Holmes v. Rice*, 45 Mich. 142; *Griffith v. Schwenderman*, 27 Mo. 412; *Roberts v. Wigglin*, 1 N. H. 73; 8 Am. Dec. 38; *Dominick v. Michael*, 4 Sand. 374; *Rose v. Daniel*, 3 Brev. 438; *Lester v. Fraser*, 2 Hill (Eq.), 529; *Riley (Eq.)* 76.

² *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101.

³ *Keane v. Boycott*, 2 H. Bl. 511.

⁴ *Kendall v. Lawrence*, 22 Pick. 540; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111; *Roberts v. Wigglin*, 1 N. H. 73; 8 Am. Dec. 38; *Lester v. Frazier*, 2 Hill (Eq.), 529; *Riley (Eq.)* 76.

⁵ *Breckenridge v. Ormsby*, 1 J. J. Marsh, 236; 19 Am. Dec. 71; *Levering v. Helghe*, 2 Md. Ch. 81; 8 Md. Ch. 385; *Dominick v. Michael*, 4 Sand. 374; *Hardy v. Waters*, 38 Me. 450; *Hill v. Keyes*, 10 Allen, 258; Ill. Land & Loan Co. v. Bonner, 75 Ill. 315; *Bozeman v. Browning*, 31 Ark. 364; *Veal v. Fortson*, 57 Tex. 482; *Austin v. Charlestown Female Sem.*, 8 Met. 196.

⁶ *Hussey v. Jewett*, 9 Mass. 100; *Hill v. Keyes*, 10 Allen, 258; *Breckenridge v. Ormsby*, 1 J. J. Marsh, 236; 19 Am. Dec. 71; *Counts v. Bates*, Harp. (L.) 464; *Parsons v. Hill*, 8 Mo. 135; *Ferguson v. Bell's Admr.*, 17 Mo. 347; *Jefford's Admr. v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108; *Hardy v. Waters*, 38 Me. 450; *Vaughan v. Parr*, 20 Ark. 600; *Bozeman v. Browning*, 31 Ark. 364; *Tillinghast v. Holbrook*, 7 R. I. 230; *Hastings v. Dollarhide*, 24 Cal. 195.

⁷ *Chandler v. Simmons*, 27 Mass. 508; 93 Am. Dec. 117.

of a minor cannot avoid or confirm his ward's contracts, for the reason that the election, whether to avoid or confirm, is reserved to the minor until he comes of age, and a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward.¹

And the contract is binding on the other party, if he be an adult, if the infant elects not to avoid it.² Hence while the mere promise of an infant to marry is not binding upon him, yet the adult party to the contract is bound, and therefore the infancy of the plaintiff is no defense to an action for breach of promise against the adult.³

§ 155. **Torts Connected with Contracts.** — As infancy is no defense to an action of tort, it has been sometimes attempted to hold the infant liable on his contract by framing the petition in tort for negligence or fraud. But it is well settled that a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it.⁴ Therefore an infant is not liable to an action for fraudulently representing himself to be of full age and thereby inducing the plaintiff to contract with him,⁵ nor for fraudulently

¹ *Chandler v. Simmons*, 97 Mass. 511; 93 Am. Dec. 117; *Oliver v. Houdlet*, 13 Mass. 240; 7 Am. Dec. 134; *Orymes v. Day*, 1 Bailey (L.) 320.

² *Chicago, etc., R. R. v. Lammert*, 19 Ill. App. 135; *Johnson v. Rockwell*, 12 Ind. 76; *Beeson v. Carlton*, 13 Ind. 354; *Cannon v. Alsbury*, 1 A. K. Marsh, 76; 10 Am. Dec. 709; *Arnous v. Lesassier*, 10 La. 592; 29 Am. Dec. 470; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Boyden v. Boyden*, 9 Met. 519; *Stiff v. Keith*, 143 Mass. 224; *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238; *Voorhees v. Wait*, 15 N. J. (L.) 343; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; *Yates v. Lyon*, 61 N. Y. 344; *Orymes v. Day*, 1 Ball. (L.) 320; *Harris v. Musgrove*, 59 Tex. 401.

³ *Holt v. Ward Clarendieux*, 2 Strange, 937; *Cannon v. Alsbury*, 1 A. K. Marsh, 76; 10 Am. Dec. 709; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496.

⁴ *Gilson v. Spear*, 38 Vt. 311; 88 Am. Dec. 659; *Homer v. Thwing*, 3 Pick. 492; *Eaton v. Hill*, 50 N. H. 235; 9 Am. Rep. 189; *Freeman v. Roland*, 14 R. I. 39; *Ray v. Tubbs*, 50 Vt. 688; *Penrose v. Curren*, 2 Rawle, 351; *Mathews v. Cowan*, 50 Ill. 341; *West v. Moore*, 14 Vt. 447; *Campbell v. Perkins*, 8 N. Y. 440; *Moore v. Eastman*, 1 Hun, 578; *Studwell v. Shapter*, 54 N. Y. 249.

⁵ *Curtin v. Patton*, 11 S. & R. 309; *Homer v. Thwing*, 3 Pick. 492; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Geer v. Hovy*, 1 Root, 179;

selling property of another as his own,¹ nor for a fraudulent warranty, representation or concealment on the sale of a chattel as to its condition or quality.² So where an infant hired a horse and injured it by overriding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence.³

But while an infant who hires a chattel is not liable for any nonfeasance, or want of or failure to use care and skill so long as he keeps within the terms of the bailment, yet if he departs from the object of the bailment and uses the article for a different purpose than that for which it was hired, he is liable as for a conversion, and if he injures the chattel by any willful and positive act, he is responsible in damages, for the injury.⁴ Therefore where an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable; for "what was done by the defendant was not an abuse of the contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal."⁵ And an infant is liable for money or goods intrusted to and embezzled by him⁶ and for money or the proceeds of property stolen by him.⁷

Watson v. Billings, 38 Ark. 278; 42 Am. Rep. 1; Nest v. Jewett, 61 Vt. 501. *Contra*, Kilgore v. Jordan, 17 Tex. 341; Rice v. Boyer, 108 Ind. 472; 58 Am. Rep. 53.

¹ Doran v. Smith, 49 Vt. 353.

² West v. Moore, 14 Vt. 447; 39 Am. Dec. 235; Gilson v. Spear, 38 Vt. 311; 88 Am. Dec. 659; Morrill v. Aden, 19 Vt. 505; Green v. Greenbank, 2 Marsh. 488; Prescott v. Morris, 33 N. H. 101; Hewitt v. Warren, 10 Hun. 560. *Contra*, Rice v. Boyer, 108 Ind. 472; 58 Am. Rep. 53; Wood v. Vance, 1 N. & Mc. 197.

³ Jennings v. Randall, 8 T. R. 335; Eaton v. Hill, 50 N. H. 239; 9 Am. Rep. 189.

⁴ Homer v. Thwing, 3 Pick. 492; Green v. Sperry, 16 Vt. 393; 42 Am. Dec. 519; Towne v. Wiley, 23 Vt. 355; 56 Am. Dec. 85; Ray v. Tubbs, 50 Vt. 688; 28 Am. Rep. 519; Eaton v. Hill, 50 N. H. 239; 9 Am. Rep. 189; Campbell v. Stakes, 2 Wend. 137; 19 Am. Dec. 561; Fisk v. Ferris, 5 Duer, 49; Moore v. Eastman, 1 Hun. 578.

⁵ Jennings v. Randall, *supra*.

⁶ Peigne v. Sutcliffe, 4 McCord, 387; 17 Am. Dec. 756. See Penrose v. Curren, 3 Rawle, 351; 24 Am. Dec. 356.

⁷ Shaw v. Coffin, 58 Me. 254; 4 Am. Rep. 290; Elwell v. Martin, 62 Vt. 217.

(G)

MARRIED WOMEN.

§ 156. **Property Rights of Wife at Common Law.** — At common law a married woman (except in a few special cases)¹ was not capable of making a valid contract, and was therefore not liable on any contract which she might enter into.² By marriage the husband became entitled to the rents and profits of all real estate owned by the wife at the time of the marriage, and of all such as might come to her during coverture,³ and if a child was born of the marriage his interest lasted for the whole of his life whether his wife survived him or not.⁴ As to the personal property of the wife in her possession, the husband became entitled at once on the marriage to it absolutely. He might dispose of it as he saw fit during his life, whether with or without his wife's consent; he might bequeath it by will; and after his death such property was regarded as assets of his estate, the title passing to his executors and administrators to the exclusion of the wife, though she survived him.⁵ And the wife's earnings belonged to the

¹ These cases were: 1. The wife of one civilly dead — *i. e.*, outlawed or under conviction of felony, might contract, sue and be sued as a feme sole. Pollock Contr. 81. 2. So where the husband was never within the State or has gone beyond the jurisdiction, intending to desert the wife. Gregory v. Paul, 15 Mass. 31; Rhea v. Renner, 1 Pet. 105; Phelps v. Walther, 78 Mo. 320; Blumenberg v. Adams, 49 Cal. 308; Smith v. Silence, 4 Ia. 321; Ayer v. Warren, 47 Me. 217; Clark v. Valentine, 41 Ga. 143; Rosenthal v. Mayhugh, 33 Ohio St. 155. 3. So where the relation of husband is put an end to by divorce or a judicial separation. Pollack, 88; Anson Contr. 118. 4. A married woman might acquire contractual rights by reason of personal services rendered by her, or of the assignment to her of a *chose in action*. In such cases the husband might "re-

duce into possession" rights of this nature accruing to his wife, but unless he did this by some act indicating an intention to deal with them as his, they did not pass, like other personalty of the wife, into the estate of the husband. They survived to the wife if she outlived her husband, or passed to her representatives if she died in his life-time. Lawson Rights, Rem. & Pr., § 733.

² Lawson Rights, Rem. & Pr., § 747; Schouler H. & W. 98; Tobey v. Smith, 15 Gray, 535; Lee v. Lanahan, 58 Me. 478; Burton v. Marshall, 4 Gill, 487; 45 Am. Dec. 171; Palmer v. Oakley, 2 Doug. 433; 47 Am. Dec. 41; Harris v. Taylor, 3 Sneed. 536; 67 Am. Dec. 578.

³ Bowle v. Stonestreet, 6 Md. 418; 61 Am. Dec. 318; Harrod v. Myers, 21 Ark. 592; 76 Am. Dec. 409.

⁴ Schouler H. & W. 167.

⁵ 2 Kent's Com. 143; Bingham on In-

husband;¹ and so did real estate purchased with the wife's earnings during coverture.²

§ 157. **Her Separate Estate, in Equity.**—But whenever the husband or his representative was forced to seek the aid of a court of chancery to recover his wife's property, *i. e.*, to reduce it into his possession, the court obliged him to set apart a portion for the separate benefit of herself and her children and this was called the wife's equity to a settlement.³ And finally it was held that not only when the husband was the suitor, but also when the wife alone petitioned for it, a court of equity would grant her the right to her equity to a settlement out of the personalty which she brought to her husband.⁴ Equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the court of chancery in England gradually widened and developed this principle until it became fully settled, that however the wife's property might be acquired, whether through contract with her husband before marriage or by gift from him or from any stranger independently of such

fancy and Coverture, 208; *Legg v. Legg*, 8 Mass. 99; *Lamphir v. Creed*, 8 Ves. 599; *Winslow v. Crocker*, 17 Me. 29; *Hoskins v. Miller*, 2 Dev. 360; *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501; *Morgan v. Thames Bk.*, 14 Conn. 99; *Hawkins v. Craig*, 6 T. B. Mon. 257; *Caffey v. Kelly*, 1 Busb. Eq. 48; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Hopkins v. Carey*, 23 Miss. 54; *Cropsey v. McKinney*, 30 Barb. 47; *Carleton v. Lovejoy*, 54 Me. 445; *Bell v. Bell*, 37 Ala. 536; 79 Am. Dec. 73.

¹ *McDavid v. Adams*, 77 Ill. 155; *Bucher v. Ream*, 68 Pa. St. 421; *Yopst v. Yopst*, 51 Ind. 61; *Gould v. Carlton*, 55 Me. 611; *Woodbeck v. Havens*, 42 Barb. 66; *Reynolds v. Robinson*, 64 N. Y. 885; *Prescott v. Brown*, 23 Me. 305; 39 Am. Dec. 623; *McLemore v. Pinkston*, 31 Ala. 266; 68 Am. Dec. 167; *Armstrong v. Armstrong*, 32 Miss. 279; *Belford v. Crane*, 16 N. J. Eq. 265; 84

Am. Dec. 155; *Hoyt v. White*, 46 N. H. 265; *Raybold v. Raybold*, 20 Pa. St. 308; *Stimson v. White*, 20 Wis. 562; *Jones v. Reid*, 12 W. Va. 350; 29 Am. Rep. 455; *Glaze v. Blake*, 56 Ala. 379; *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500; *Lyme v. Riddle*, 33 N. C. 463; *Cunningham v. Hanney*, 12 Ill. App. 437; *Gorman v. Wood*, 73 Ga. 370; *Skillman v. Skillman*, 15 N. J. Eq. 473; 82 Am. Dec. 279.

² *Cramer v. Reford*, 17 N. J. (Eq.) 367; 90 Am. Dec. 594; *Bynum v. Frederick*, 31 Ala. 489.

³ 2 Kent's Com. 137; 3 Story's Eq. Jur. § 635; *Glen v. Fisher*, 6 Johns. Ch. 33; 10 Am. Dec. 310; *Helms v. Franciscus*, 2 Bland Ch. 544; 20 Am. Dec. 402; *Duval v. Bank*, 4 Gill & J. 232; 23 Am. Dec. 558; *Wilks v. Fitzpatrick*, 1 Humph. 54; 34 Am. Dec. 618.

⁴ *Elbank v. Montallieu*, 1 Smith's Lead Cas. 464.

contract, equity would protect it, if duly set apart as her separate estate.¹ Nor was the interposition of a trustee essential; the court would even hold the husband, if necessary, a trustee for her.² It was necessary, however, that the property conveyed or devised to the wife in order to be held by her as separate estate, should have been so conveyed or devised with the intention of being held by her as her separate property. But the courts looked at the intention and no particular form of words was necessary to create it.³

§ 158. *Contracts of Wife in Equity.*—The chancery courts, though granting and recognizing the separate estate of a married woman, for a long period refused to grant her the power of contracting debts or making contracts which would bind her separate property. Eventually, however, being pressed by the injustice of allowing her after having solemnly and deliberately entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the courts at first ventured so far as to hold, that if she made a contract for payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal,⁴ in that case the property settled to her separate use should be made liable to the payment of it; and this principle — if principle it could be called — was subsequently extended to instruments of a less formal character, such as bills of exchange⁵ or promissory

¹ Schouler on Husband and Wife, 191; *Beaufort v. Collier*, 6 Humph. 487; 44 Am. Dec. 321.

² *Rech v. Cockell*, 9 Ves. 375; *Barron v. Barron*, 24 Vt. 375; *Steel v. Steel*, 1 Ired. (Eq.) 452; *Carroll v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350; *Boykin v. Cliples*, 2 Hill Ch. 200; 29 Am. Dec. 67; *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101.

³ *Nix v. Bradley*, 6 Rich. (Eq.) 48; *Schouler on Husband and Wife*, 192; *Martin v. Bell*, 9 Rich. Eq. 42; 70 Am.

Dec. 200; *Gaines v. Poor*, 3 Met. Ky. 508; 79 Am. Dec. 559; *Magill v. Trust Co.*, 81 Ky. 129; *Duke v. Duke*, 81 Ky. 308; *Fox v. Jones*, 1 W. Va. 205; 91 Am. Dec. 333; *Clark v. Peck*, 41 Vt. 145; 98 Am. Dec. 573; *Robinson v. Randolph*, 21 Fla. 629; 58 Am. Rep. 692.

⁴ *Hulme v. Tenant*, 1 Smith's Lead. Cas. 525; *Heatley v. Thomas*, 15 Ves. 596.

⁵ *Stuart v. Kirkwall*, 3 Madd. 387; *Owen v. Homan*, 4 H. L. Cas. 997; *McHenry v. Davis*, L. R. 10 Eq. 88.

notes,¹ then to any written agreement,² and ultimately to mere verbal agreements.³

This rule originating with the English courts has been generally followed in the United States, where it is held that unless specially restrained by the instrument creating the separate estate, a married woman is with respect to that estate a *feme sole* in equity, and may dispose of the estate in any way she please; and a specification in the deed of settlement of particular modes in which she may dispose of the estate will not of itself restrain her from disposing of it in any other manner.⁴ This rule has been followed in the Federal courts and in the courts of all the States except South Carolina,⁵ Pennsylvania,⁶ Alabama,⁷ Illinois,⁸ Rhode Island,⁹ Mississippi,¹⁰ Tennessee¹¹ and Ohio.¹²

§ 159. **The Wife's Statutory Estate.**—Within late years in nearly all the States, statutes have been passed making sweeping changes in the property rights of married women and their power to make contracts. These statutes, though having the same end in view, are so different in their provisions that a review of them in this place is impossible and the statutes themselves and the construction given them by the court must be sought in the special text-books on

¹ *Bulpin v. Clarke*, 17 Ves. 385; *Field v. Sowle*, 4 Russ. 112.

² *Master v. Fuller*, 1 Ves. Jr. 515; *Murray v. Barlee*, 5 Mylne & K. 209; *Picard v. Hine*, L. R. 5 Ch. App. 274.

³ *Matthewson's Case*, L. R. 3 Eq. 787.

⁴ *Jaques v. Meth. Epis. Church*, 17 Johns. 549; 8 Am. Dec. 447; *Harris v. Harris*, 7 Ired. (Eq.) 111; 53 Am. Dec. 393; *Patton v. Bank*, 12 W. Va. 587; *Radford v. Carwile*, 13 W. Va. 572; *Johnson v. Cummins*, 16 N. J. (Eq.) 97; 84 Am. Dec. 142; *Rogers v. Ward*, 8 Allen, 337; 85 Am. Dec. 710.

⁵ *Ewing v. Smith*, 3 Desaus. 417; 5 Am. Dec. 557; *Reid v. Lamar*, 1 Strobb. (Eq.) 27; *Robinson v. Dart*, Dud. (Eq.) 128; 31 Am. Dec. 569; *Calhoun v. Calhoun*, 2 Strobb. (Eq.) 231; 49 Am. Dec. 667.

⁶ *Lancaster v. Dolan*, 1 Rawle, 231; 18 Am. Dec. 625; *West v. West*, 10 Serg. & E. 445; *Jones' Appeal*, 57 Pa. St. 367; *Thomas v. Folwell*, 2 Whart. 11; 30 Am. Dec. 230.

⁷ *Short v. Battle*, 52 Ala. 456.

⁸ *Cookson v. Toole*, 56 Ill. 515; *Bressler v. Kent*, 61 Ill. 426; 14 Am. Rep. 67.

⁹ *Metcalf v. Cook*, 2 R. I. 355.

¹⁰ *Doty v. Mitchell*, 9 Smedes & M. 435.

¹¹ *Marshall v. Stephens*, 8 Humph. 159; 47 Am. Dec. 601; *Laird v. Scott*, 5 Heisk. 350; *Dedrick v. Armour*, 10 Humph. 596; *Litton v. Baldwin*, 8 Humph. 309; 47 Am. Dec. 605.

¹² *Macher v. Burroughs*, 14 Ohio St. 519.

the law of married women.¹ They provide generally that the real and personal property of a woman owned by her on her marriage shall remain her separate property free from the interference or control of her husband; that all real property acquired after marriage by the wife either by devise or descent, by purchase or gift, by her own labor or by any other manner, shall remain her sole and separate property; that all personal property acquired in the same manner shall follow the same rule.

§ 160. **Wife's Contracts for "Necessaries."** — The wife, as agent for the husband, has an authority to bind the husband for "necessaries" ² purchased by her. But it must be borne in mind that this agency does not arise from the relation of the parties alone but must be founded on (1) *express authority*, (2) *estoppel*, or (3) *necessity*. The fact that a wife is living with her husband does not entitle persons dealing with her to presume that the husband has given her authority to pledge his credit even for necessities.³

¹ Especially the works of Bishop and Schouler. See also Stewart (Law of Husband and Wife, 1885), and Kelly (Contracts of Married Women, 1882). The statutes will be found well indexed in 1 Stimson Stat. L. 64:0 *et seq.*, and a summary of them is given in a note to Kirkpatrick v. Buford, 21 Ark. 268, in 78 Am. Dec. 367, 401.

² Lawson Rights, Rem. & Pr., § 719.

³ "Necessaries" as in the case of an infant are such things as are necessary to her health and comfort having regard to the means and social position of husband and wife. Hall v. Weir, 1 Allen, 281; Parke v. Kleeber, 37 Pa. St. 251. Food, lodging, clothing, fuel and washing are within the term. So is furniture. Hunt v. DeBlaquiere, 5 Bing. 550. Jewelry suitable to her station in life. Raynes v. Bennett, 114 Mass. 424. Medicine and medical attendance. Mayhew v. Thayer, 8 Gray, 172; Carstens v. Haneselman, 61 Mich. 426; 1 Am. St. Rep.

606; Webber v. Spambake, 2 Redf. 256; Spawn v. Mercer, 8 Met. 337; Cothran v. Lee, 24 Ala. 380. Dentistry. Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrus, 28 Vt. 241; 67 Am. Dec. 713; Servants. Bazeley v. Fowler, L. R. 3 Q. B. 562. A horse worth \$40, for the exercise of an invalid wife of a miller earning \$30 a month. Cornelia v. Ellis, 11 Ill. 584. A piano. Parke v. Kleeber, 37 Penn. St. 241. But the following are not "necessaries": Articles beyond the husband's means and his place in society. Caney v. Patton, 2 Ashm. 140; Phillipson v. Hayter, L. R. 6 C. P. 38. Money lent to purchase necessities. Walker v. Simpson, 7 W. & S. 83; 42 Am. Dec. 216; *contra*, Kenyon v. Farris, 47 Conn. 510; 36 Am. Rep. 86. The services of a quack doctor. Wood v. O'Kelley, 8 Cush. 406. A pew in church. St. Johns Parish v. Brownson, 40 Conn. 78; 16 Am. Rep. 17. £67 worth of dry goods, outfit for a watering-place, for the wife of a poor

1. Where the husband has given the wife express authority to purchase necessities upon credit, here of course he is bound, and the same result follows where he ratifies her contracts made without his authority.¹

2. Where the husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has induced to look to him for payment, revoke her authority without notice. "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, *in the absence of notice to the contrary*, that the authority of the wife which the husband has recognized continues. The husband's quiescence in such a case amounts to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume.² But in the absence of such authority arising from conduct the husband is entitled as against persons dealing with his wife to revoke any express or implied authority which he may have

barrister. *Atkins v. Curwood*, 7 C. & P. 759. Bonnets, laces, feathers, and ribbons, to the amount of £5,287, in part of a year. *Lane v. Ironmonger*, 13 M. & W. 368. Jewelry for the wife of a special pleader. *Montague v. Benedict*, 3 B. & C. 681. Passage money to enable wife to join husband. *Knox v. Bushell*, 3 O. B. (N. S.) 834. A planet. *Chappell v. Nunn*, 20 Alb. L. J. 18. £969 worth of foreign birds for the rich wife of a poor rector. *Freestone v. Butcher*, 6 C. & P. 643. A ball dress worth \$30. *Sharpley v. Dautre*, 4 Can. Leg. News, 185. Pipes, tobacco, and cigars. *Bradley v. Murray*, 68 Ala. 270. Costs of divorce and other legal proceedings against the husband are held in a number of cases to be "necessaries;" *Grindell v. Godmond*, 5 Ad. & El. 753; *Wilson v. Ford*, L. R. 3 Ex. 63; *Sprayberry v. Merk*, 30 Ga. 81; 76 Am. Dec. 637; *Porter v. Briggs*, 38 Ia. 166; 18 Am. Rep. 27; *Warner v. Heiden*, 28 Wis. 517; 9 Am. Rep. 515; *Conant v. Burnham*, 123 Mass. 508; 43 Am. Rep. 532. While

in others they are held not to be such. *Johnson v. Williams*, 3 G. Green, 97; 54 Am. Dec. 491; *Pearson v. Darrington*, 33 Ala. 227; *Ray v. Adden*, 50 N. H. 82; 9 Am. Rep. 175; *Dow v. Eyster*, 79 Ill. 254; *Whipple v. Giles*, 55 N. H. 189; *Williams v. Munro*, 18 B. Mon. 514; *Wing v. Hurlburt*, 15 Vt. 607; 40 Am. Dec. 605; *Coffin v. Dunham*, 8 Cush. 404; 54 Am. Dec. 769; *Shelton v. Pendleton*, 18 Conn. 417; *Johnson v. Williams*, 3 Ia. 97; *Drals v. Hogan*, 50 Cal. 121; *Morrison v. Holt*, 42 N. H. 478; 80 Am. Dec. 121; *Thompson v. Thompson*, 3 Head. 527.

¹ *Lawson Rights, Rem. & Pr.*, § 728; *Giltman v. Andrus*, 28 Vt. 241; 67 Am. Dec. 713; *Delano v. Blanchard*, 52 Vt. 578; *Mackinley v. McGregor*, 3 Whart. 369; 81 Am. Dec. 522; *Segelbaum v. Ensminger*, 117 Pa. St. 248; 2 Am. St. Rep. 662.

² *Debenham v. Mellor*, 5 Q. B. Div. 394; 6 App. Cas. 24; *Clark v. Cox*, 32 Mich. 204.

given her, and to do so without notice to persons so dealing. The tradesman must be taken to know the law; he knows that the wife has no authority in fact or in law to pledge the husband's credit even for necessities, unless he expressly or impliedly gives it her, and that what the husband gives he may take away."¹

3. The husband being bound to maintain his wife in a manner suitable to his estate and condition, if he fail to supply that maintenance, except under certain circumstances which justify him in withdrawing it, she may be entitled from necessity to pledge his credit to that extent;² nor can the husband revoke or deprive her of such authority, even by express notice to the party who supplies her.³ Thus if a husband by his conduct compels his wife to leave his house, she has power to pledge his credit for her necessary maintenance elsewhere.⁴ So also where he abandons her.⁵ And during a husband's absence from home the wife as his agent has extensive powers.⁶

If the wife of her own fault desert her husband or refuse to live with him, her authority as his agent ceases, especially if she also commit adultery.⁷ But if she

¹ *Ilebenham v. Mellor*, *supra*.

² *Manby v. Scott*, 2 *Smith's Lead Cas.* 375; *Morrison v. Holt*, 42 N. H. 478; 80 Am. Dec. 120.

³ *Bolton v. Prentice*, 2 *Strange*, 1214. "She is considered his agent with uncountermandable authority to order the necessities on his credit." *Campbell, C. J.*, in *Jenner v. Morris*, 3 *De Gex, F. & J.* 51.

⁴ *Houliston v. Smyth*, 3 *Bing.* 127; *Hancock v. Merrick*, 10 *Cush.* 41; *Mayhew v. Thayer*, 8 *Gray*, 172; *Reynolds v. Sweetzer*, 15 *Gray*, 78; *Hultz v. Gibbs*, 66 *Pa. St.* 360; *Billing v. Filcher*, 7 *B. Mon.* 458; 48 *Am. Dec.* 523; *Shrock v. Shrock*, 4 *Bush*, 684; *Mitchell v. Treanor*, 11 *Ga.* 324; 56 *Am. Dec.* 421.

⁵ *Ellier v. Orull*, 99 *Ind.* 375; *Carstens v. Hanselman*, 61 *Mich.* 426; 1 *Am. St. Rep.* 606.

⁶ *Meador v. Page*, 39 *Vt.* 206; *Benjamin*

v. Benjamin, 15 *Conn.* 347; 89 *Am. Dec.* 334; *Savage v. Davis*, 18 *Wis.* 608; *Humes v. Taber*, 1 *R. I.* 464; *Rotch v. Miles*, 2 *Conn.* 638; *McAfee v. Robertson*, 41 *Tex.* 355; *Butts v. Newton*, 29 *Wis.* 632; *Buford v. Speed*, 11 *Bush*, 358; *Krebs v. O'Grady*, 23 *Ala.* 726; 58 *Am. Dec.* 312; *Felker v. Emerson*, 16 *Vt.* 638; 42 *Am. Dec.* 532; *Ranson v. Spangler*, 18 *Cent. L. J.* 29 (*Iowa*); *Casteel v. Casteel*, 8 *Blackf.* 240; 44 *Am. Dec.* 763.

⁷ *Atkyns v. Pearce*, 2 *Conn. B. (N. S.)* 763; *Cooper v. Lloyd*, 6 *Conn. B. (N. S.)* 579; *Eastland v. Burchell*, L. R. 3 *Q. B.* D. 432; *Morris v. Martin*, 1 *Strange*, 647; *Child v. Hardyman*, 2 *Strange*, 875; *Manby v. Scott*, 1 *Sid.* 109; *McCutchin v. McGahay*, 11 *Johns.* 281; 6 *Am. Dec.* 373; *Henderson v. Stringer*, 2 *Dana*, 292; *Hunter v. Boucher*, 3 *Pick.* 239; *Oinson v. Heritage*, 45 *Ind.* 73; *Bevier v. Galloway*, 7 *Ill.* 517; *Sturtevant v. Starin*, 19 *Wis.*

offer to return and he will not receive her, he becomes liable.¹

Except in these three cases the wife cannot bind the husband for necessities supplied to her; and it will be a good defense to such a suit that she was supplied by him with necessities or had a separate allowance for their purchase.² And of course where it appears that the credit was given exclusively to the wife, the husband cannot be charged.³

(H)

INSANE PERSONS.

§ 161. *Contracts of Insane Persons.*—The contract of an insane person is voidable at his option,⁴ and, therefore,

268; *Brown v. Mudgett*, 40 Vt. 68; *Porter v. Bobb*, 25 Mo. 36; *Billing v. Pilcher*, 7 B. Mon. 458; 48 Am. Dec. 523; *Gill v. Read*, 5 R. I. 343; 73 Am. Dec. 73; *Thome v. Kashan*, 51 Vt. 520.

¹ *Cunningham v. Irwin*, 7 Serg. & R. 247; 10 Am. Dec. 458.

² *Jolly v. Rees*, 15 O. B. (N. S.) 628; *Richardson v. Dubois*, L. R. 5 Q. B. 51; *Mott v. Comstock*, 8 Wend. 544; *Kimball v. Keyes*, 11 Wend. 63; *Baker v. Barney*, 8 Johns. 72; 5 Am. Dec. 826; *Cromwell v. Benjamin*, 41 Barb. 556; *Carey v. Patton*, 3 Ashm. 140; *Furlong v. Hysom*, 30 Me. 332; *Rea v. Durkee*, 25 Ill. 503; *Olson v. Heritage*, 45 Ind. 73; 15 Am. Rep. 258; *Alley v. Winn*, 134 Mass. 77; 45 Am. Rep. 297. In *Clark v. Cox*, 32 Mich. 204, Mr. Justice Cooley says: "The points in difference between the parties in this case may be settled thus: The plaintiffs maintain that the wife is presumably agent of the husband in the purchase of her own apparel and of such articles of use and comfort for the family as are usually purchased by the wife rather than the husband; and that while husband and wife are living together a dealer who has no knowledge of any express limitations imposed by the husband on the wife's authority to make such purchases may safely rely upon the legal presumption of her authority, and

hold the husband liable on her purchases. The defendant on the other hand insists that the presumption goes no further than this. That if the husband does not himself procure for her the necessary articles suitable to her and his condition or furnish her with money to procure them for herself, it is presumed he authorized her to purchase them on his credit; in other words that any presumption that he authorizes her to employ his credit in the purchase of necessities is rebutted by his purchasing them himself or giving her money for the purchase, and this was the view taken by the circuit judge. There can be no doubt, we think, that the authorities fully sustain the rulings of the court below."

³ *Metcalfe v. Shaw*, 3 Camp. 22; *Mitchell v. Treanor*, 11 Ga. 324; 56 Am. Dec. 421; *Happek v. Harthy*, 7 Bart. 411; *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243.

⁴ *Lazell v. Pinnick*, 1 Tyler, 247; 4 Am. Dec. 723; *Grant v. Thompson*, 4 Conn. 203; 10 Am. Dec. 119; *Eaton v. Eaton*, 37 N. J. (L.) 108; 18 Am. Rep. 716; *Ingraham v. Baldwin*, 9 N. Y. 45; *Hovey v. Hobson*, 53 Me. 453; 89 Am. Dec. 705; *Hovey v. Chase*, 52 Me. 304; 83 Am. Dec. 514; *Allen v. Berryhill*, 37 Iowa, 540; 1 Am. Rep. 309; *Elstoa v. Jasper*, 45 Tex.

one may prove, in avoidance of his contract, that he was *non compos mentis* when he entered into it,¹ although a similar privilege is not allowed to the party with whom he contracted.² The insanity to avoid the contract must be an absolute incapacity to understand the nature and effect of the act,³ and, therefore, mere weakness of mind,⁴ or partial insanity or monomania, unconnected with the subject-matter of the contract,⁵ is not sufficient, though a moderate degree of incapacity may be sufficient where the transaction is accompanied with fraud, imposition or duress.⁶

Where the person has been adjudged a lunatic, and placed under guardianship, contracts made by him thereafter are absolutely void,⁷ unless the guardianship has been aban-

409; *Kye v. Davis*, 1 Md. 32; *Chew v. Bank*, 14 Md. 299; *Crouse v. Holman*, 19 Ind. 30; *Somers v. Pumphrey*, 24 Ind. 231; *Nichol v. Thomas*, 53 Ind. 42; *Hallett v. Oakes*, 1 Cush. 296; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Breckenridge v. Ormsby*, 1 J. J. Marsh, 236; 19 Am. Dec. 71; *Fitzgerald v. Reed*, 9 Smedes & M. 94; *Burke v. Allen*, 23 N. H. 196; 61 Am. Dec. 642; *Carrler v. Sears*, 4 Allen, 336; *Walt v. Maxwell*, 5 Pick 217; 16 Am. Dec. 391; *Sutton v. Reagan*, 5 Blackf. 217; 33 Am. Dec. 466; *Bensell v. Chancellor*, 5 Whart. 371; 34 Am. Dec. 561; *Allis v. Billings*, 6 Met. 415; 30 Am. Dec. 744; *Coleman v. Frazer*, 3 Bush, 300. In a few cases it has been incorrectly held that the contract is absolutely void, and not merely voidable. *Desilver's Estate*, 5 Rawle, 110; 28 Am. Dec. 645; *Van Deusen v. Sweet*, 51 N. Y. 578; *Dexter v. Hall*, 15 Wall. 9; *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470.

¹ *Mitchell v. Klingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; 10 Am. Dec. 119; *Lang v. Whidden*, 2 N. H. 435; *Thornton v. Appleton*, 29 Me. 208; *Tolson v. Garner*, 15 Mo. 494; *Rice v. Peet*, 15 Johns. 508. The contract is voidable in favor of the person of unsound mind although he has brought on that condition by habitual drunkenness. *Menkins v. Lightner*, 18 Ill. 222; *Bliss v. R. R. Co.*, 24 Vt. 424.

² *Howe v. Howe*, 99 Mass. 98.

³ *Titcomb v. Vanlyle*, 84 Ill. 371; *Wall v. Hill*, 1 B. Mon. 290; 36 Am. Dec. 378; *Hovey v. Chase*, 52 Me. 305; 83 Am. Dec. 514; *Stewart v. Llapenard*, 26 Wend. 235; *Davren v. White*, 42 N. J. (Eq.) 569; *Young v. Stevens*, 48 N. H. 183; 97 Am. Dec. 592.

⁴ *Baldrick v. Garvey*, 66 Ia. 14; *Kimball v. Cuddy*, 117 Ill. 213; *Lindsey v. Lindsey*, 50 Ill. 77; 99 Am. Dec. 489; *Jackson v. King*, 4 Cow. 207; 15 Am. Dec. 354; *DeLafield v. Parish*, 25 N. Y. 1; *Ellis v. Matthews*, 19 Tex. 390; 70 Am. Dec. 833; *Juzan v. Toulmin*, 9 Ala. 682; 44 Am. Dec. 448; *Smith v. Beatty*, 2 Ired. (Eq.) 456; 40 Am. Dec. 435; *Dennett v. Dennett*, 44 N. H. 531; 84 Am. Dec. 97; *Owing's Case*, 1 Bland, 370; 17 Am. Dec. 311.

⁵ *Galpin v. Willson*, 40 Ia. 90; *Marks v. Hill*, 15 Gratt. 422; *Scarle v. Galbreath*, 73 Ill. 267; *Lewis v. Baird*, 3 McLean, 56; *Staples v. Wellington*, 58 Me. 453; *Boyce v. Smith*, 9 Gratt. 704; 60 Am. Dec. 318. As for example, a belief in spiritualism. *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84.

⁶ *Corbit v. Smith*, 7 Ia. 60; 71 Am. Dec. 431.

⁷ *Walt v. Maxwell*, 5 Pick. 217; *Rannells v. Gerner*, 80 Mo. 477; *Ingraham v. Baldwin*, 9 N. Y. 45; *Elaton v. Jasper*, 45 Tex. 409; *Fitz Hugh v. Wilcox*, 13 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169;

doned, or no guardian has been appointed, or the guardian appointed has resigned.¹

A contract or liability assumed by a person while of sound mind may be enforced against him when he is of unsound mind,² and a contract made during a lucid interval is valid.³ The party may ratify the contract if he afterwards becomes sane;⁴ or in a subsequent lucid interval;⁵ or if he continues insane, his heirs, after his death, may ratify it.⁶

§ 162. **Insanity Not Known to Other Party.**—It seems doubtful, even in the case of executory contracts, whether the transaction can be avoided on the ground of lunacy as against a contracting party who had no reason to suppose that he was dealing with an insane person.⁷ But it may be safely said that when such person is not under a conservator or guardian duly appointed by law, and is apparently of sound mind, and the other contracting party has no reasonable cause to believe otherwise, the contract cannot be avoided, if it is fair and has been so far performed that the other party cannot be restored to his former position.⁸

Pearl v. McDowell, 3 J. J. Marsh, 658; 20 Am. Dec. 189; *Leonard v. Leonard*, 14 Pick. 280; *L'Amoureux v. Crosby*, 2 Paige, Ch. 422; 22 Am. Dec. 655.

¹ *Elston v. Jaspar*, 45 Tex. 409; *Mohr v. Tulip*, 40 Wis. 66.

² *King v. Robinson*, 33 Me. 114; 54 Am. Dec. 614; *Haggart v. Ranger*, 15 Fed. Rep. 860.

³ *Hall v. Warren*, 9 Ves. 606; *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722; *Gangwere's Estate*, 14 Pa. St. 417; 53 Am. Dec. 554; *Jones v. Perkins*, 5 B. Mon. 222.

⁴ *Howe v. Howe*, 29 Mass. 98; *Cole v. Cole*, 5 Sneed. 63; 70 Am. Dec. 275; *Hovey v. Chase*, 52 Me. 304; 83 Am. Dec. 514.

⁵ *Brown v. Hodgdon*, 31 Me. 67.

⁶ *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705.

⁷ *Anson Contr.*, 115.

⁸ *Behrens v. McKenzie*, 23 Iowa, 333; 22 Am. Dec. 428; *Rusk v. Fenton*, 14 Bush, 490; 29 Am. Rep. 418; *Ballard v.*

McKenna, 4 Rich. (Eq.) 258; *Molton v. Camroux*, 2 Ex. 501; *Heavan v. McDonnell*, 9 Ex. 309; *Loomis v. Spencer*, 2 Paige, 153; *Sprague v. Duel*, 11 Paige, 480; *Eaton v. Eaton*, 37 N. J. (L.) 108; 18 Am. Rep. 716; *Scanlan v. Cobb*, 85 Ill. 269; *Wilder v. Weskley*, 34 Ind. 184; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 593; *Beals v. See*, 10 Pa. St. 56; 49 Am. Dec. 573; *Lancaster Bank v. Moore*, 78 Pa. St. 414; 21 Am. Rep. 24; *Lincoln v. Buckmaster*, 33 Vt. 638; *Faye v. Burditt*, 81 Ind. 433; 43 Am. Rep. 142; *Carr v. Hollday*, 51 Fed. (Eq.) 167; *Langley v. Langley*, 45 Ark. 392; *Cribben v. Maxwell*, 34 Kan. 8; 55 Am. Rep. 233; *Sims v. McLure*, 8 Rich. (Eq.) 286; 70 Am. Dec. 196; *Alexander v. Haskins*, 68 Iowa, 73; *Riley v. Bank*, 36 Hun, 579; *Mutual Insurance Co. v. Hunt*, 79 N. Y. 541; *Matheson v. McMahon*, 38 N. J. (L.) 587; *Cribben v. Maxwell*, 34 Kan. 8; *Burnam v. Kinsnell*, 118 Ill. 425; *Shelters v. Allen*, 51 Mich.

§ 163. **Contracts for Necessaries.** — The insane person is liable for necessities supplied to him even by one who had notice of his incapacity¹ and even though he is in charge of a conservator or guardian.² And his estate is liable likewise for the maintenance of his wife and family,³ and for the costs of a commission of lunacy.⁴

(I)

DRUNKARDS.

§ 164. **Contracts Made by Intoxicated Persons.** — A contract entered into with one so intoxicated as to be deprived of the exercise of his understanding is voidable, although the intoxication were voluntary, and not procured through the intervention of the other party.⁵ Merely being

581. In the Massachusetts case of *Seaver v. Phelps*, 11 Pick. 304, 23 Am. Dec. 372, the contrary was held, the court saying that the fairness of the defendant's conduct could not supply the plaintiff's want of capacity. And some cases following the principle of this case hold that where the insane person received no benefit under the contract, the contract cannot be enforced against him, and if executed he may recover whatever of value he parted with, notwithstanding the other party to the contract may have acted in good faith without knowledge of the infirmity. *Van Patton v. Beals*, 46 Iowa, 63; *Northwestern Mutual Ins. Co. v. Blankenship*, 94 Ind. 535; *Lincoln v. Buckmaster*, 32 Vt. 558. And a few cases hold that the deed of an insane person, who never recovers his reason, is void, and that in an action to recover the land by his heirs it is no defense to show that his grantee purchased in good faith. *Rogers v. Blackwell*, 49 Mich. 192; *Vandusen v. Sweet*, 51 N. Y. 378; *Dexter v. Hall*, 15 Wall. 9; *Somers v. Pumphrey*, 24 Ind. 231. But *Seaver v. Phillips* is not law, and the rule as stated in the text is sustained by a great majority of the adjudications, and seems to be as well settled as any rule of law can be.

¹ *Barter v. Portsmouth*, 5 B. & C. 170; *La Rue v. Gilkyson*, 4 Pa. St. 375; 45 Am. Dec. 700; *Read v. Legard*, 6 Exch. 636; *Shaw v. Thompson*, 16 Pick. 290; *Ingraham v. Baldwin*, 9 N. Y. 48; *Surles v. Pipkin*, 69 N. C. 513; *Skidmore v. Romaine*, 2 Bradf. 123, 610; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Ex parte Northington*, 37 Ala. 496; 79 Am. Dec. 67; *Tally v. Tally*, 2 Dev. & B. 385; 34 Am. Dec. 401; *Darby v. Cabanne*, 1 Mo. App. 127; *Beals v. See*, 10 Pa. St. 56; 49 Am. Dec. 573; *Sawyer v. Lufkin*, 56 Me. 308; *Van Horn v. Hahn*, 39 N. J. (L.) 207; *Hallett v. Oakes*, 1 Oush. 296; *Kendall v. May*, 10 Allen, 59; *Richardson v. Strong*, 13 Ired. 106; 55 Am. Dec. 430; *McCormick v. Littler*, 85 Ill. 62; 28 Am. Rep. 610; *Henry v. Fine*, 23 Ark. 417.

² *Sawyer v. Lufkin*, 56 Me. 308; *McCullis v. Bartlett*, 8 N. H. 569; *Fruitt v. Anderson*, 12 Ill. App. 421.

³ *Read v. Legard*, 6 Ex. 636.

⁴ *Williams v. Wentworth*, 5 Beav. 325.

⁵ *Bush v. Breinig*, 113 Pa. St. 310; 57 Am. Rep. 469; *Menkins v. Lightner*, 18 Ill. 282; *Burroughs v. Richman*, 13 N. J. (L.) 233; 23 Am. Dec. 717; *Foot v. Tewksbury*, 2 Vt. 97; *Taylor v. Patrick*, 1 Bibb, 168; *White v. Cox*, 3 Hayw. (Tenn.) 82; *Curtis v. Hall*, 4 N. J. (L.) 361; *Holland v. Barnes*, 53 Ala.

under the influence of liquor is not enough; there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing.¹

If the drunkard after becoming sober ratifies his contract it becomes binding on him,² and he is liable for necessities supplied to him while intoxicated.³

A contract made by a drunkard, under guardianship, is void though he is proved sober when it was made;⁴ though when there has been no judicial finding or commission putting him under guardianship, an habitual drunkard may make a valid contract while sober.⁵

The other party cannot avoid his agreement on account of the intoxication,⁶ but the drunkard on rescinding his contract is obliged to restore the consideration.⁷ The drunkenness of the maker of a negotiable instrument is no defense against a *bona fide* holder for value without notice.⁸

(J)

AGENTS.

§ 165. The Right to Contract by an Agent — Divisions of The Subject. — Although it is a rule of the common

38; 25 Am. Rep. 595; *Menkins v. Lightner*, 18 Ill. 282; *Carpenter v. Rodgers*, 61 Mich. 384; 1 Am. St. Rep. 595; *Gore v. Gibson*, 13 Mees. & W. 623; *Butler v. Mulvihill*, 1 Bligh, 187; *Wigglesworth v. Steers*, 1 Hen. & M. 70; 3 Am. Dec. 603; *Wade v. Colvert*, 2 Mill Const. 27; 12 Am. Dec. 652; *Bates v. Bell*, 72 Ill. 108; *Johns v. Fritchey*, 39 Md. 256; *Woodson v. Gordon*, 1 Peck, 196; 14 Am. Dec. 743; *Barrett v. Buxton*, 2 Alk. 167; 16 Am. Dec. 691; *Crane v. Conklin*, 1 N. J. (Eq.) 346; 22 Am. Dec. 519; *Harbison v. Lemon*, 3 Blackf. 51; 23 Am. Dec. 377; *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441.

¹ *Ewell's Leading Cases*, 738; *Miller v. Finley*, 26 Mich. 234; *Caulkins v. Fry*, 35 Conn. 170; *Pickett v. Sutter*, 5 Cal. 412; *Cavender v. Waddingham*, 5 Mo App. 457; *Reynolds v. Dechaums*, 24 Tex. 174; 76 Am. Dec. 101; *Johns v.*

Fritchey, 39 Md. 258; *Wright v. Fisher*, 65 Mich. 279; 8 Am. St. Rep. 886. See *Wilson v. Bigger*, 7 W. & S. 111.

² *Matthews v. Baxter*, L. R. 8 Ex. 132; *Carpenter v. Rodgers*, 61 Mich. 384; 1 Am. St. Rep. 595; *Lyon v. Phillips*, 106 Pa. St. 57.

³ *Gore v. Gibson*, 13 M. & W. 625.

⁴ *Wadsworth v. Sharpsteen*, 8 N. Y. 388; 59 Am. Dec. 499.

⁵ *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *Van Wych v. Brosher*, 81 N. Y. 282.

⁶ *Matthews v. Baxter*, *supra*; *Carpenter v. Rodgers*, *supra*.

⁷ *Joest v. Williams*, 42 Ind. 565; 13 Am. Rep. 377.

⁸ *State Bk. v. McCoy*, 69 Pa. St. 304; 8 Am. Rep. 216; *Caulkin v. Fry*, 35 Conn. 170; *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306.

law that one cannot by a contract with another confer rights or impose liabilities upon a third person, nevertheless one man may represent another by virtue of a contract of employment between them, and this employment for the purpose of representation is called a contract of agency.

So far as we are concerned with agency for the purpose of creating contractual relations it retains no trace in the common law of its origin in *status*. Even where a man employs as his agent one who is incapable of entering into a contract with himself, as where he gives authority to his child, being an infant, the authority must be given, it is never inherent. There must be evidence of intention on the one side to confer, on the other to undertake, the authority given, though the person employed may, from defective status, be unable to sue or be sued on the contract of employment.

From this general rule we must, however, except that form of agency known as "agency of necessity," a quasi-contractual relation formed by the operation of rules of law upon the circumstances of the parties, and not by the agreement of the parties themselves. In all other cases one cannot become the agent of another except by his authority either express or implied.¹

The rules which govern the relation of principal and agent fall under three heads:

I. The mode of forming the relation.

II. The effect of the relation when formed: under which we will consider. (1) The effect of the contract of employment as between principal and agent. (2) The rights and liabilities of the parties where the agent contracts for a named principal. Is the agent more than a mere instrument of communication; and does he incur any liabilities, and of what sort, if he exceeds his powers or asserts an authority which he does not possess? (3) The rights and

¹ *McGoldrick v. Willits*, 52 N. Y. 612; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. 315.

liabilities of the parties where he has contracted as agent, but without disclosing his principal's name: or in his own name, without disclosing his principal's existence. What then are the relations to each other of the two real parties to the contract, and of the agent to the party who is not his employer?

III. The mode in which the relation is brought to an end, *i. e.* the determination of the agent's authority.

(I)

THE MODE OF FORMING THE RELATION.

§ 166. **Introductory.** — The mode of forming the relation of principal and agent will be considered in reference to (a) the capacity of the parties, (b) the form of the contract of employment.

(a) *The Capacity of the Parties.*

§ 167. **Who May be Principal and Agent.** — In regard to the capacity of the parties to form the contract of agency it may be said generally that no one can appoint an agent, *i. e.*, be a principal, who is not capable of making a contract, and that on the other hand, whatever a person may legally do himself, he may legally do by the hand of another.¹ Therefore, persons under disabilities, as idiots, lunatics, persons *non compos mentis*, infants, married women, alien enemies and convicts are so far as they are incapable of making contracts, incapable of being principals:²

On the other hand, any one may be an agent, and it matters not that he has not in other respects the capacity to make a contract.³ The reason given for this distinction is that the execution of a naked authority can in no way be

¹ *Weaver v. Carnall*, 35 Ark. 196; 37 Am. Rep. 22; *Montgomery Co. v. Robinson*, 35 Ill. 174.

² See cap. as to Parties, and see *Lawson Rights, Rem. & Pr.*, § 3-5.

³ *Lyon v. Kent*, 45 Ala. 656.

prejudicial to the person under such disability or incapacity as infancy or the like, or to any other person who by law may claim any interest of such person after their death.¹

But a person having an adverse interest cannot act as an agent in the transaction.² Hence a person cannot be the agent of both parties, where their interests are adverse or incompatible,³ nor can one act in the same transaction for himself and for another.⁴ Yet when the double agency is with the consent of the principals it is valid.⁵ And one cannot appoint an agent to do a purely personal act.⁶ Thus a man cannot appoint an agent to marry a woman for him or to make a will for him.⁷ Nor where an act is required by statute to be done by the party, if it can be inferred from the nature of the act that it was intended to be personally done, can it be done by an attorney or agent, as for example the making of a deed by a married woman, with the formalities of acknowledgment and private examination.⁸ Nor can one appoint an agent to do an illegal act.⁹

(b) *The Form of the Contract of Employment.*

§ 168. **Formation of the Contract of Agency — In General.**—The methods by which the contract of agency may be formed, are the methods by which a contract of any kind may be formed, *i. e.*: (1) by an offer of a promise for an act, as where one's services are requested in such a manner as to import a promise to indemnify for any loss, risk or expense in rendering them—the case of gratuitous agency.¹⁰ (2) By an offer of an act for a promise, as

¹ Evans Agency, 17.

² Bain v. Brown, 56 N. Y. 285.

³ Hinchley v. Arey, 27 Me. 362; Sumner v. Charlotte R. O., 78 N. C., 298; Greenwood v. Spring, 54 Barb. 78. See post, § 181.

⁴ Neuenhoff v. World Life Ins. Co., 69 N. Y. 389.

⁵ Lawson Rights, Rem. & Pr., §§ 7, 94.

⁶ Ex parte Ugra Bank, L. R. 6 Oh. 206.

⁷ Lawson Rights, Rem. & Pr., § 25.

⁸ Story Agency, § 12, note.

⁹ Elmore v. Brooks, 6 Helsk. 45; Davis v. Barger, 57 Ind. 54; Brown v. Howard, 14 Johns. 120; State v. Mathis, 1 Hill (S. C.), 87.

¹⁰ One who undertakes to do a service for another, gratuitously, is liable only

where one makes a contract for another without his authority, but the latter afterwards accepts the act and ratifies it; (3) By an offer of a promise for a promise, as where the promises are mutual to employ and remunerate on the one side, and to do the work required on the other.

§ 169. **Form of the Contract.**—It is a rule of the common law that to authorize an agent to make a binding contract under seal it is essential that he should receive his authority by an instrument under seal.¹ A disposition is manifest in the American courts to relax the strictness of this rule, especially in its application to partnership and commercial transactions,² and it is held that if the instrument would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, but if executed under a parol authority or subsequently ratified by parol it will be valid and binding upon the principal.³ So a deed of land made by an agent under a parol authority, though inoperative to convey the title, will in equity be regarded as evidence of a contract to convey and will bind the principal to make the conveyance.⁴ And where the deed is made by the agent *in the presence* of the principal a verbal or even an implied authority is sufficient.⁵ And in

for *misfeasance* and not for *nonfeasance*. In an English case it was held a good cause of action that the defendant gratuitously undertook to effect a fire insurance for the plaintiff and by omitting some necessary formalities made it impossible for the plaintiff to recover upon the policy. No action would have lain if he had simply neglected to insure at all; *Wilkinson v. Coverdale*, 1 Esp. 75.

¹ *Lawson Rights*, Rem. & Pr., § 13; *Schuetze v. Bailey*, 40 Mo. 69; *Preston v. Hull*, 23 Gratt. 600; 14 Am. Rep. 153; *Humphreys v. Finch*, 97 N. C. 303; 2 Am. St. Rep. 293.

² *Worrall v. Monn*, 5 N. Y. 229; 55 Am. Dec. 320.

³ *Worrall v. Munn*, *supra*; *Dickerman v. Ashton*, 21 Minn. 538; *Ingraham*

v. Edwards, 64 Ill. 528; *Love v. Sierra Nev. Co.*, 52 Cal. 639; 91 Am. Dec. 602; *Tapley v. Butterfield*, 1 Met. 515; 25 Am. Dec. 374; *Despatch Line v. Bellamy*, 12 N. H. 206; 37 Am. Dec. 203; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 733; *State v. Watts*, 44 N. J. (L.) 126.

⁴ *Groff v. Ramsay*, 19 Minn. 44; *Schuetze v. Bailey*, 40 Mo. 69; *Newton v. Bronson*, 18 N. Y. 503; 67 Am. Dec. 89; *Jackson v. Murray*, 5 T. B. Mon. 184; 17 Am. Dec. 53; *Force v. Dutcher*, 18 N. J. (Eq.) 401; *Dodge v. Hopkins*, 14 Wis. 630; *Johnson v. McGruder*, 15 Wis. 365.

⁵ *Jansen v. McCahill*, 22 Cal. 563; 83 Am. Dec. 84; *Gardner v. Gardner*, 5 Oush. 483; *McMurtry v. Brown*, 6 Neb. 363.

all other cases it is not required that the authority should be given in any special form, either writing or words being sufficient.¹

Formerly it was said that an authority to act as one's agent should in every instance be given by deed or other instrument under seal so that the proof of the authority would be clear and indisputable in every case. But such a rule would be clearly absurd in our day, when the multifarious transactions of commerce must be carried on with speed and without circumlocution.²

§ 170. Acts and Conduct. — The authority may also be inferred from the acts and conduct of the parties, and this inference is more readily drawn when they stand in certain relations to each other.³ Thus if a master allows his servant to purchase goods for him of another habitually, upon credit, that other becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing.⁴ So if the wife is allowed to deal with a tradesman for the ordinary supplies of the household the husband will be considered to have held her out as his agent and to be liable for her purchases.⁵ Yet there is nothing in the relations of master and servant or husband and wife to give any inherent authority to the servant or the wife. The authority can only spring from the words or conduct of the master or husband. On the other hand the contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business. And each partner accepts a corresponding

¹ Story on Agency, § 46; Long v. Colburn, 11 Mass 97; 6 Am. Dec. 160. In some cases, the authority is required by statute to be in writing, as under the Missouri statute of frauds, where the authority of the agent to sign a memorandum for the sale of lands is required to be in writing. But under the statutes of frauds of nearly all the States this is

not essential. Lawson Rights, Rem. & Pr., § 16.

² Lawson Rights, Rem. & Pr., § 10.

³ Story on Agency, § 54, 55; Gilbraith v. Lineberger, 69 N. C. 145.

⁴ 1 Shower, 95.

⁵ Debenham v. Mellor, 5 Q. B. D. 408; ante § 160.

liability for the acts of his fellows.¹ The relations of marriage and employment, enable an authority to be readily inferred from conduct. But apart from these, conduct alone may create so strong a presumption of authority that the person so acting is estopped from denying that it has been conferred.² To all these cases (excepting, of course, partnership) the term agency by *estoppel* may be applied. They differ only in the greater or less readiness with which the presumption will be created by the conduct of the parties. By *estoppel* is meant a prohibition to deny facts *a belief* in which has been created by the *conduct* of the party estopped.

§ 171. *Necessity.* — Circumstances operating upon the conduct of the parties may create in certain cases agency *from necessity*. A husband is bound to maintain his wife:³ if therefore he wrongfully leave her without means of subsistence she becomes “an agent of necessity to supply her wants upon his credit.”⁴ A carrier of goods or a master of a ship may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. It has even been held that where goods are exported, unordered, or not in correspondence with samples, the consignee has, in the interest of the consignor,⁵ an authority to effect a sale of them. But here the relation of principal and agent does not arise from agreement; it is imposed by law on the circumstances of the parties.

¹ *Hawken v. Bourne*, 3 M. & W. 710; *Lawson Rights, Rem. & Pr.*, Title III.

² *Farmers, etc., Bk. v. Butchers Bk.*, 16 N. Y. 145; 69 Am. Dec. 678; Am. Ins. Co. v. Oakley, 9 Paige, 496; 38 Am. Dec. 561; *Gullick v. Grover*, 33 N. J. (L.) 465; 97 Am. Dec. 728; *Kiley v. Forsee*, 57 Mo. 390; *Sweetser v. French*, 2 Cush. 300; 48 Am. Dec. 606; *Weaver v. Ogletree*, 39 Am. 536; *Pennsylvania R. R. Co. v. Atha*, 22 Fed. Rep. 920; *Freiberg v. Beach Hotel*, etc.,

Co., 63 Tex. 449; *Paine v. Tillinghast*, 52 Conn. 532; *Webster v. Wray*, 17 Neb. 579; *Emerson v. Miller*, 37 Pa. St. 278.

³ *Eastland v. Burchell*, 3 Q. B. D. at p. 436.

⁴ *Eller v. Crull*, 99 Ind. 375; *Watkins v. DeArmond*, 89 Ind. 553; *Ferren v. Moore*, 59 N. H. 106; *Pierpont v. Wilson*, 49 Conn. 450; *ante* § 160.

⁵ *Kemp v. Pryor*, 7 Ves. 246.

§ 172. **Ratification.**—The relation of principal and agent may also arise by *ratification*, i. e., by the party adopting and taking the benefit and liabilities of a contract made by another person on his behalf, but without his authority,—ratification being equivalent to antecedent authority. For example, if A professes to enter into a contract for me without my authority, and I afterwards ratify it, my ratification relates back so as to have the same effect as if I had authorized him to enter into the contract for me.¹ But if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to defeat those rights.²

The principal is bound by the act whether it be to his detriment or to his advantage, and whether it be in contract or in tort.³ A ratification once made cannot be revoked by the principal.⁴ And it must be *in toto*; the principal cannot ratify one part of the agent's acts and reject the other part, for that would allow him to accept the agent's unauthorized act so far as it was beneficial to him, and to reject what was against his interest—a thing the law will not allow.⁵ By adopting a part he is bound by the whole.⁶ Thus where A sells B's live stock, and gives

¹ Lawson Rights, Rem. & Pr., § 29; Drakely v. Gregg, 8 Wall. 242; Goss v. Stevens, 33 Minn. 472; Hawley v. Keeler, 53 N. Y. 114; Sheldon H. B. Co. v. Eschemeyer H. B. Co., 90 N. Y. 613; Gulich v. Grover, 33 N. J. (L.), 463; 97 Am. Dec. 728; Rich v. State Bank, 7 Neb. 201; 23 Am. Rep. 332; Planters Bk. v. Sharp, 4 S. & M. 75; 43 Am. Dec. 470; Everett v. U. S., 6 Port. 186; 30 Am. Dec. 584; Gilmore v. Wilbur, 12 Rich. 120; 23 Am. Dec. 410; Vincent v. Rather, 31 Tex. 77; 98 Am. Dec. 516; Francis v. Kerker, 85 Ill. 190; Wallace v. Lawyer, 90 Ind. 499; McDowell v. McKenzie, 63 Ga. 630; Davis v. Krum, 12 Mo. App. 279; Grogan v. San Francisco, 18 Cal. 590; Burgess v. Harris, 47 Vt. 322.

² Wood v. McClain, 7 Ala. 800; 42 Am.

Dec. 612; Lewis v. Buttrick, 103 Mass. 412.

³ Wilson v. Truman, 6 M. & G. 236; Moorehouse v. Northrop, 33 Conn. 380; 83 Am. Dec. 211.

⁴ Bell v. Eyerson, 11 Ia. 238; 77 Am. Dec. 142; Breck v. Jones, 16 Tex. 441; Hazleton v. Batchelder, 44 N. Y. 10; Beall v. January, 62 Mo. 434.

⁵ Bennett v. Judson, 21 N. Y. 2389; Cochran v. Chitwood, 59 Ill. 58; Southern Ex. Co. v. Palmer, 48 Ga. 85; Menkins v. Watson, 27 Mo. 163; Drennan v. Walker, 21 Ark. 539; Billings v. Morrow, 7 Cal. 171; 68 Am. Dec. 235; Babcock v. De Ford, 14 Kan. 408; Taylor v. Connor, Mass. 722; 97 Am. Dec. 419.

⁶ Odiorne v. Maxey, 13 Mass. 183; Skinner v. Dayton, 19 Johns. 554; 10 Am.

a warranty of their soundness, B, by ratifying the sale and accepting the money, ratifies also the giving of the warranty.¹ So a debtor cannot have the benefit of a compromise made by another with his creditors without adopting all the representations made by that other in negotiating it.² And a principal cannot say that he will ratify the act "if he receive no harm thereby;" he must repudiate absolutely or be bound absolutely.³

But where the ratification is made under a mistake or in ignorance of the full extent of the agent's act it is voidable to the extent of the mistake.⁴ And the ratification is binding only where it is made with full knowledge on the part of the principal of all the material facts.⁵ Thus where an agent for the sale of real estate exceeded his instructions in selling one part of the land which he was not authorized to sell, and the principal afterwards impliedly ratified all his acts by receiving the money for the sale of all the land but it appeared that he did not know that the part in question had been sold, it was held that the agent's sale was neither authorized nor ratified.⁶ And in an English case a landlord authorized a bailiff to distrain for rent due to him from his tenant of a farm, directing him not to take anything that was not on the premises. The bailiff distrained cattle of another person, supposing them to be the tenant's, beyond the boundary of the farm; the cattle were sold and the landlord received the proceeds. The court ruled that

Dec. 286; *Bennett v. Judson*, 21 N. Y. 288; *Mundorff v. Wickersham*, 63 Pa. St. 87.

¹ *Cochran v. Chitwood*, 59 Ill. 53.

² *Crans v. Hunter*, 28 N. Y. 389.

³ *Fort v. Coker*, 11 Heisk. 579.

⁴ *Smith v. Tracy*, 63 N. Y. 79; *Baldwin v. Burrows*, 47 N. Y. 199; *Lester v. Kinne*, 37 Conn. 9; *Miller v. Board of Education*, 44 Cal. 166.

⁵ *Lawson Rights, Rem. & Pr.*, § 34; *Bank of Owensboro v. Western Bk.*, 13 Bush. 526; 26 Am. Rep. 211; *Etna Ins. Co. v. Northwestern Ins. Co.* 21 Wis. 458; *Morris, etc. It. Co. v. Green*, 15 N. J. (Eq.), 470;

Mapp v. Phillips, 32 Ga. 72; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235; *Tedrich v. Rice*, 13 Iowa, 214; *Owings v. Hall*, 9 Pet. 607; *Day v. Holmes*, 100 Mass. 306; *Hankin v. Baker*, 46 N. Y. 630; *Walters v. Munro*, 17 Md. 150; 77 Am. Dec. 328; *Reynolds v. Feeroce*, 86 Ill. 570; *Miller v. Bd. of Education*, 44 Cal. 166; *Snow v. Grace*, 29 Ark. 131; *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Manning v. Gashane*, 27 Ind. 399; *Hovey v. Brown*, 59 N. H. 114; *Dean v. Bassett*, 57 Cal. 640.

⁶ *Lester v. Kinne*, 37 Conn. 9.

the landlord was not liable for the bailiff's act, unless he had ratified it with knowledge of the irregularity, or unless he had chosen, without inquiry, to take the risk upon himself and to adopt all of his acts.¹ But knowledge of material facts may be inferred from circumstances, and the principal may by his conduct preclude himself from denying such knowledge.²

The agent must have contracted for such matters as the principal had power to do, for if the agent enters into a contract on behalf of a principal who is incapable of making it or for an illegal purpose there can be no ratification.³ On this ground it has been held in England that a person cannot ratify a forgery of his name,⁴ though this principle does not obtain in the United States.⁵

The agent must have made the contract *as an agent*; *i.e.* on behalf of the person who ratifies it.⁶ If having a principal he contracts in his own name he cannot divest himself of his personal liability to have the contract enforced as against him or against his principal when discovered, at the option of the party with whom he has dealt, and if he has no principal and contracts in his own name he can only divest himself of his rights and liabilities by assignment.⁷

The agent must act for a principal who is in contemplation,⁸ and therefore he cannot make a contract with a vague expectation that some one will relieve him of his liability.

¹ Lewis v. Read, 13 M. & W. 834.

² Scott v. Middleton, etc., R. R. Co., 86 N. Y. 200; Forbes v. Haymann, 75 Va., 158.

³ Mason v. Caldwell, 5 Gilm. 196; 48 Am. Dec. 330; Seeery v. Sprayfield, 112 Mass. 512; O'Connell v. Arnold, 53 Ind. 105; Armitage v. Widoe, 36 Mich. 124; Board of Supervisors v. Arrighi, 54 Miss. 668; McCracken v. San Francisco, 16 Cal. 59; Richardson v. Payne, 114 Mass. 429; Harrison v. McHenry, 9 Ga. 164; 52 Am. Dec. 435; State v. Mathis, 1 Hill (S. C.), 37.

⁴ Brook v. Hook, L. R. 6 Ex. 79; McKenzie v. British Linen Co., 6 App. Cas. 62.

⁵ Lawson Rights, Rem. & Pr., § 32 and cases cited. But see *contra*, Shisler v. Vandike, 92 Pa. St. 447; 37 Am. Rep. 704.

⁶ Condit v. Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; Vanderbilt v. Turnpike Co., 2 N. Y. 479; 51 Am. Dec. 315; Alldred v. Bray, 41 Mo. 484; Bevenoge v. Rawson, 51 Ill. 504; Grund v. VanVleck, 69 Ill. 479; Com. Bank v. Jones, 18 Tex. 811; Richardson v. Payne, 114 Mass. 429; Collan v. Swan, 7 Robt. 623.

⁷ Anson Contr., § 336.

⁸ Vanderbilt v. Turnpike Co., 2 N. Y. 479; Bevenoge v. Rawson, 51 Ill. 504; Roby v. Coasitt, 75 Ill. 638.

ties. But this rule does not present ratification in the case of brokers making contracts, as agents, in the expectation that customers with whom they are in the habit of dealing will take them off their hands. Thus, in contracts of marine insurance, persons "who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. But then they must be persons who were contemplated at the time the policy was made." And the principal may exist only in contemplation of law, as in the case of estates of deceased or bankrupt persons; an agent may contract on behalf of the estate, and the administrators or trustees may take advantage of the contract though they were not appointed or even ascertained at the time of its making.

The principal must be in existence at the time the unauthorized transaction took place.¹ Thus where a person enters into a contract as promoter or trustee on behalf of a corporation not yet formed, and the company when formed adopts his acts, this is making a new contract by it, and not ratifying the existing one.² In *Kelner v. Baxter*³ the promoters of a company as yet unformed entered into a contract on its behalf and the company when duly incorporated ratified the contract. It became bankrupt and the defendant who had contracted as its agent was sued upon the contract. It was argued that the liability had passed, by ratification, to the company and no longer attached to the defendant, but the court held that this could not be. "Could the 'company,' " said Willis, J., "become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation."

¹ *Watson v. Swan*, 11 C. B. (N. S.) 771;
Lawson Rights, Rem. & Pr., § 33.

² *Lawson Rights, Rem. & Pr.*, § 33.
³ L. R. 2 C. P. 175.

§ 173. **Form of Ratification.**—Where there is an express assent to or an express confirmation of the transaction either by word of mouth or in writing, the proof of the ratification is not difficult, though it is to be borne in mind that if the agent's contract is required by law to be under seal then the principal's ratification must be under seal likewise.¹ But where the agent has unnecessarily affixed a seal to the contract the ratification need not be under seal.² And in all cases no formal words are essential, if it can be gathered from the contents of the instrument or the language used that an express ratification was intended.³

§ 174. **Ratification by Acts and Conduct.**—It is not even necessary that the principal should declare the unauthorized act confirmed by him in so many words.⁴ His acts and conduct are always construed liberally in favor of the agent; and when they are inconsistent with anything else but a ratification, the presumption of ratification is almost conclusive,⁵ and especially is this so where it was manifestly for his benefit.⁶ Thus silence may raise a presumption of ratification, for a principal who knows of an unauthorized act having been done in his name by his agent must give notice of his dissent within a reasonable time,⁷ though he is not required to disown the act the very instant he hears of it.⁸ So accepting the benefits of the unauthorized act⁹

¹ *Lawson Rights, Rem. & Pr.*, § 40 and cases cited. But there are cases denying that this is requisite. *Holbrook v. Chamberlin*, 116 Mass. 115; 17 Am. Rep. 140.

² *Ledbetter v. Walker*, 31 Ala. 175; *Bates v. Best*, 13 B. Mon. 215.

³ *Story on Agency*, § 252.

⁴ *Lovejoy v. Middlesex R. Co.*, 128 Mass. 480; *Hawkins v. Lange*, 22 Minn. 557; *Leaving v. Butler*, 69 Ill. 575; *Cooper v. Schwartz*, 40 Wis. 54; *Szyman-ski v. Plassan*, 20 La. Ann. 90; 96 Am. Dec. 382.

⁵ *Penn. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 513; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 97.

⁶ *Flemming v. Marine Ins. Co.*, 4 Whart. 50; 33 Am. Dec. 33.

⁷ *Lee v. Fontaine*, 10 Ala. 755; 44 Am. Dec. 505; *Phil., etc., R. Co. v. Cowell*, 28 Pa. St. 329; 70 Am. Dec. 128; *Smith v. Sheehy*, 12 Wall. 358; *Fainell v. Howard*, 26 Ia. 381; *Williams v. Merritt*, 23 Ill. 623; *Lawson Rights, Rem. & Pr.*, § 41.

⁸ *Miller v. Excelsior Stone Co.*, 1 Ill. App. 773; *Dupont v. Wetherman*, 10 Cal. 354; *Robinson v. Chapline*, 9 Iowa, 91; *Walters v. Munroe*, 17 Md. 150; 77 Am. Dec. 323.

⁹ *Gibson v. Norway Sav. Bk.*, 69 Me. 579; *Darst v. Gale*, 33 Ill. 136; *Forrester v. Boardman*, 1 Story, 43; *Gold Mining Co. v. Nat. Bk.*, 96 U. S. 640; *Edie v.*

(provided, of course, that the principal was aware of all the material facts):¹ suing the party on the contract,² or suing the agent for the money received,³ or defending an action arising out of the contract,⁴ have all been held to imply a ratification.⁵

§ 175. **Declarations of Agent.** — The authority of the agent to bind the principal cannot be proved by the agent's statements as to the extent of his authority;⁶ nor can an agent give himself authority to bind his principal by false statements to those with whom he deals as to the extent of his authority;⁷ nor can a special agent enlarge his authority by such statements.⁸ Statements by an agent before he received authority to act or after it had been withdrawn, or not within the scope of his agency, do not bind his principal.⁹

§ 176. **Ratification Shifts Liability to Principal.** — The ratification by the principal absolves the agent from all liability and estops the principal from claiming damages against the agent for his unlawful interference.¹⁰ The

Ashbaugh, 44 Ia. 519; Sartwell v. Frost, 123 Mass. 184; Pike v. Duglass, 28 Ark. 59; Brown v. LaCrosse City Ins. Co., 31 Wis. 51; Gulick v. Grover, 38 N. J. (L.) 463; 97 Am. Dec. 728; Mundorf v. Wickersham, 63 Pa. St. 87; 3 Am. St. Rep. 531.

¹ Penna. R. Co. v. Dandridge, 8 Gill & J. 248; 29 Am. Dec. 543; Busby v. North Am. Ins. Co., 40 Md. 572; 17 Am. Rep. 634; Thacher v. Pray, 113 Mass. 291; 18 Am. Rep. 480; Smith v. Kidd, 68 N. Y. 139; 23 Am. Rep. 157; Bryant v. Moore, 26 Me. 84; 45 Am. Dec. 96.

² Copeland v. Ins. Co., 6 Pick. 193; Ham v. Boody, 30 N. H. 411; 51 Am. Dec. 235; Drennan v. Walker, 31 Ark. 539; Beldman v. Goodell, 59 Ia. 592.

³ Story on Agency, § 269.

⁴ Lathrop v. Com. Bk., 3 Dana, 113; 33 Am. Dec. 451.

⁵ And see illustrative cases cited on this point in Lawson Rights, Rem. & Fr., § 41, p. 43-54.

⁶ Howe Machine Co. v. Clark, 15 Kan.

492; Reynolds v. Continent Ins. Co., 36 Mich. 131; Maxey v. Heckethorn, 44 Ill. 438; Rawson v. Curtis, 19 Ill. 474; Brigham v. Peters, 1 Gray, 139; Peck v. Ritchey, 66 Mo. 114; Streeter v. Poor, 4 Kan. 413; Chicago, etc., R. Co. v. Fox, 41 Ill. 106; Harker v. Dement, 9 Gill, 7; 52 Am. Dec. 670; Perkins v. Stebbins, 29 Barb. 523; McDougald v. Dawson, 30 Ala. 533; Scarborough v. Reynolds, 12 Ala. 252; Stringham v. Ins. Co., 4 Abb. App. 315; 37 How. Pr. 375; Whiting v. Lake, 91 Pa. St. 349. But an agency may be proved by the agent himself. Thayer v. Meeker, 36 Ill. 470.

⁷ Stringham v. St. Nicholas Ins. Co., 4 Abb. App. 315; Grover & Baker Co. v. Pobbemus, 34 Mich. 247.

⁸ Stollenwerck v. Thacher, 115 Mass. 234.

⁹ Clark v. Baker, 2 Whart. 340.

¹⁰ Meehan v. Forrester, 53 N. Y. 277; McCracken v. San Francisco, 16 Cal. 591; Cairnes v. Bleecker, 12 Johns. 870;

principal becomes as liable for the agent's acts as though he had originally authorized them, and all the responsibilities are shifted from the agent to the principal.¹ The principal may in like manner bring suit on the contract,² and the agent becomes entitled to the same rights and compensation as if his act had been originally authorized.³ If an agent improperly appoints a subagent, the ratification of the acts of the subagent by the principal will bind him in the same manner as though he had originally given the agent authority to delegate the execution of his orders.⁴ But it will create no liability on the principal's part to pay for the services of the subagent.⁵

§ 177. **What Acts Cannot be Ratified.** — “Where an act is beneficial to the principal and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule [that the principal may ratify an unauthorized act] seems generally applicable. * * * On the other hand if the act done by such person would if authorized create a right to have some act or duty performed by a third person so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third person to the consequences.”⁶ The cases cited in illustration of

Owing v. Hull, 2 Pet. 607; *Thorndike v. Godfrey*, 3 Greenl. 429; *Towle v. Johnson*, 1 Johns. Cas. 110; *Farwell v. Meyer*, 35 Ill. 41; *Bray v. Gunn*, 53 Ga. 144; *Woodward v. Suydam*, 11 Ohio, 360; *Meyer v. Morgan*, 51 Miss. 21; 24 Am. Rep. 617.

¹ *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146; *Lucas v. Barrett*, 1 G. Greene, 511; *Lent v. Padleford*, 10 Mass. 230; 6 Am. Dec. 119; *Rogers v. Kneeland*, 10 Wend. 213; *Clark v. Van-Bennedyk*, 9 Cranch. 153; *Roby v. Cos-*

sett, 78 Ill. 638; *Bray v. Gunn*, 53 Ga. 144; *Palmer v. Stephens*, 1 Denio, 472; *Mason v. Caldwell*, 5 Gilm. 196; 48 Am. Dec. 330; *Violett v. Powell*, 10 B. Mon. 347; 52 Am. Dec. 548.

² Story on Agency, § 244.

³ *Hopkins v. Mollineux*, 4 Wend. 465.

⁴ *Strickland v. Hudson*, 55 Miss. 235.

⁵ *Homan v. Brooklyn Ins. Co.*, 7 Mo. App. 22.

⁶ Story on Agency, §§ 245, 246.

this rule by Story are the case of a lease containing a condition for determination by either party on six months' notice, such notice being given by an unauthorized agent;¹ the case of a demand by one without authority on a debtor for a debt;² a notice of dishonor of a note;³ and others. The ground upon which this is put is, that in these cases the advantage is all with the principal; he may play fast and loose; he may adopt the agent's acts, if he subsequently thinks it beneficial to him, and repudiate them if otherwise. So it has been held in Louisiana that the ratification of an unauthorized contract of re-insurance or double insurance must be made before the loss occurs, or it will be of no avail.⁴

II.

THE EFFECT OF THE RELATION.

§ 178. **Introductory.** — Having seen the modes in which the relation of principal and agent may be formed, we pass now to the effect of that relation. And the subject will be considered under three heads: A. The rights and liabilities of principal and agent *inter se*. B. The rights and liabilities of the parties where the agent contracts as agent for a named principal. C. The rights and liabilities of the parties where the agent contracts for a principal whose name or whose existence he does not disclose.

(A.) *Rights and Liabilities of Principal and Agent Inter Se.*

§ 179. **Duty of Principal to Reward or Indemnify Agent.** — The principal is bound to pay the agent such compensation or commission for the employment as may have been agreed upon between them or as may be cus-

¹ *Buson v. Denman*, 2 Ex. 167; *Lyster v. Goldwin*, 2 Ad. & E. (N. S.) 143.

² *Coore v. Callaway*, 1 Esp. 88; *Freeman v. Boynton*, 7 Mass. 483.

³ *Tindall v. Brown*, 1 Term. Rep. 167; *Stanton v. Blossom*, 14 Mass. 118.

⁴ *Alliance Ass. Co. v. State Ins. Co.*, La. 1; 28 Am. Dec. 117.

tomary in similar cases for similar services,¹ unless he is a gratuitous agent² or unless the value of the service performed or the express or implied understanding between the parties show that no claim for pay was intended.³ And one who acts without authority as an agent, if his acts are afterwards ratified, becomes entitled to the same compensation as if he had been duly authorized.⁴ Where the agent has agreed to leave the amount of his compensation to the principal's discretion or generosity he cannot recover more than the principal chooses to give,⁵ although if the agreement is that he is to be allowed a reasonable compensation to be fixed by his employer, he may bring his action for a reasonable compensation, if his employer neglect or refuse to fix it.⁶

But the agent can recover nothing for his services where the service was for an illegal purpose⁷ or where he has been guilty of gross neglect, unfaithfulness or fraud in the performance of his duties⁸ or has violated his instructions.⁹

He is bound likewise to indemnify the agent for all acts lawfully done in the execution of his authority.¹⁰ This extends not only to all expenses legally and properly incurred on the principal's behalf¹¹ but to all acts done by him in the course of his agency, in which he has undertaken a liability

¹ *Mangum v. Ball*, 43 Miss. 298; 5 Am. Rep. 488; *Briggs v. Boyd*, 56 N. Y. 289; *Dexter v. Campbell*, 137 Mass. 196; *Fuller v. Ellis*, 39 Vt. 345; *Lawson Usages & Customs*, § 151.

² *Story on Agency*, § 324; *Morrison v. Orr*, 3 St. & P. 47; 23 Am. Dec. 319; *Morrow v. Allison*, 39 Ala. 70.

³ *Id.*

⁴ *Wilson v. Dame*, 58 N. H. 392; *Beall v. January*, 62 Mo. 434.

⁵ *Taylor v. Brewer*, 1 M. & S. 290. See "Contracts Conditional on Will of Promisor;"

⁶ *Story on Agency*, § 325.

⁷ *Trist v. Child*, 21 Wall. 441; *Fareira v. Gabell*, 89 Pa. St. 89; *McBratney v. Chandler*, 22 Kan. 692; *Crane v. White-*

more, 4 Mo. App. 510; *Gray v. Hook*, 4 N. Y. 449; *Clippinger v. Hepbaugh*, 5 W. & S. 315; 40 Am. Dec. 519.

⁸ *Fisher v. Dynes*, 62 Ind. 348; *Smith v. Crews*, 3 Mo. App. 269; *Vennum v. Gregory*, 21 Ia. 326; *Sea v. Carpenter*, 18 Ohio, 413; *Short v. Millard*, 68 Ill. 292; *Segar v. Parrish*, 20 Gratt. 672.

⁹ *Jones v. Hoyt*, 25 Conn. 296; *Hoyt v. Shipherd*, 70 Ill. 309; *Fraser v. Wyckoff*, 63 N. Y. 445; *Beall v. January*, 62 Mo. 434.

¹⁰ *Lawson Rights, Rem. & Pr.*, § 97.

¹¹ *White v. National Bk.*, 103 U. S. 656; *Durant v. Burt*, 98 Mass. 161; *Brown v. Phelps*, 103 Mass. 313; *Beach v. Branch*, 57 Ga. 363.

or sustained a damage.¹ In *Howe v. Buffalo, etc., Railroad Co.*² a railroad conductor was instructed by the company not to receive for fare a certain class of tickets. A passenger having presented one of these tickets, the conductor refused to receive it and ejected the passenger. The passenger having brought suit against him and obtained judgment it was held that he had a right to recover against the company the amount of the judgment and the damage sustained by him in carrying out his orders. "The plaintiff," said the court, "acted in good faith and in obedience to the defendant's instructions. He supposed the company to possess the authority it assumed, and he found himself involved in a serious liability by fidelity in discharge of a duty imposed by his principal where he was wholly free from intentional wrong. * * * The court below was right in holding that the plaintiff was entitled to redress. There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed."

The liability, however, must not have been incurred without cause or beyond the agent's authority or instructions,³ or after his authority has been revoked;⁴ nor must the agent have been guilty of negligence or unfaithfulness in his agency.⁵ If the money advanced by the agent or the liability incurred by him, were advanced or incurred for an illegal or immoral purpose, no suit will lie by the agent against the principal for re-imbursement,⁶ unless the agent

¹ *Mohawk, etc., R. Co. v. Costigan*, 2 Sandf. Ch. 306; *Green v. Goddard*, 9 Metc. 223; *Howard v. Clark*, 43 Mo. 344; *Yeatman v. Corder*, 38 Mo. 337; *Coventry v. Barton*, 17 Johns. 142; 8 Am. Dec. 376; *Clark v. Jones*, 16 Lea 351; *Grace v. Mitchell*, 31 Wis. 533; 11 Am. Rep. 613; *Tarr v. Northy*, 17 Me. 113; 35 Am. Dec. 233.

² 57 N. Y. 298.

³ *Pickering v. Demeritt*, 100 Mass. 415; *Day v. Holmes*, 103 Mass. 307; *Van Dyke v. Brown*, 8 N. J. (Eq.) 657;

Schrack v. McKnight, 84 Pa. St. 26; *Corbin v. American Mills*, 27 Conn. 274; 71 Am. Dec. 63; *Williams v. Littlefield*, 12 Wend. 362; *Howard v. Tucker*, 1 Barn. & Ald. 772; *Saveland v. Green*, 36 Wis. 612.

⁴ Story on Agency, § 349.

⁵ *Dodge v. Tilesen*, 12 Pick. 333; *Montrion v. Jeffreys*, 3 Car. & P. 113; *Storer v. Eaton*, 50 Me. 219; 79 Am. Dec. 611.

⁶ *Armstrong v. Toler*, 11 Wheat. 258;

had no knowledge of the illegality of the transaction, or his act was not a part of it.¹

And the loss must have proceeded directly from the execution of the authority. An agent who should be robbed of his own money while on a journey for his principal, or should receive an injury while similarly engaged, would clearly have no recourse against his principal for indemnity.²

§ 180. Duties of Agent — In General. — For a violation of those duties which the agent owes to the principal and which the principal has a right to expect of the agent, the latter is responsible for all the damages which are the natural result thereof.³ These duties are to enter upon the performance of the agency after having accepted the employment,⁴ to use ordinary skill and diligence in the discharge of his duties,⁵ to act in good faith in the interest of the principal,⁶ to obey his orders and instructions,⁷ to give notice to the principal of every fact which it is to his interest to know for his guidance,⁸ to keep regular accounts of his transactions in his principal's business,⁹ and to

Kennett v. Chambers, 14 How. 38; *Callagan v. Hallett*, 1 Calnes, 104; *Graves v. Delaplaine*, 14 Johns. 146; *Fareira v. Gabell*, 89 Pa. St. 89; *Ward v. VanDuzer*, 2 Hall, 182; *Stebbins v. Leowolf*, 3 Cush. 137; *Trustees v. Galatian*, 4 Cow. 340; *St. John v. St. John's Church*, 15 Barb. 346. The rule in England seems to be different. See *Reed v. Anderson*, 13 Q. B. D. 779; *Seymour v. Bridge*, 14 Q. B. D.

¹ *Armstrong v. Toler*, 11 Wheat. 258; *Greenwood v. Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Rosewarne v. Billing*, 15 C. B. (N. S.) 316; *Moore v. Appleton*, 26 Ala. 633; *Drummond v. Humphreys*, 39 Me. 347; *Warren v. Hewitt*, 45 Ga. 501.

² *Powell v. Trustees*, 19 Johns. 284.

³ *Price v. Keyes*, 62 N. Y. 378; *Dodge v. Tillotson*, 12 Pick. 328; *Bell v. Cunningham*, 3 Pet. 69; *Johnson v. Wade*, 58 Tenn. 430.

⁴ *Lawson Rights, Rem. & Pr.*, § 78.

⁵ *Myles v. Myles*, 6 Bush, 237; *Moore v. Gholson*, 34 Miss. 372; *Hemenway v. Hemenway*, 5 Pick. 389; *Mitchell v. Aten*, 37 Kan. 331; 1 Am. St. Rep. 231.

⁶ *Holladay v. Davis*, 5 Oregon, 49; *Rubidoex v. Parke*, 48 Cal. 215.

⁷ *Clarke v. Roberts*, 26 Mich. 506; *Follansbee v. Parker*, 70 Ill. 11; *Williams v. Higgins*, 30 Md. 404; *Robinson Machine Co. v. Vorse*, 52 Iowa, 207; *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168; *Lavery v. Snethen*, 68 N. Y. 522; 23 Am. Rep. 184; *Bank of Owensboro v. Western Bank*, 13 Bush, 526; 26 Am. Rep. 211; *Rechtschard v. Bank*, 47 Mo. 181.

⁸ *Clark v. Bank*, 17 Pa. St. 324; *Forrestier v. Boardman*, 1 Story, 41; *Dodge v. Perkins*, 9 Pick. 368.

⁹ *White v. Lincoln*, 8 Vesey, 363; *Lawson Rights, Rem. & Pr.*, § 89.

account to his principal for money received, goods sold and orders obtained.¹

These duties are clear and need no extended illustration or explanation. But there are others to which a more extended discussion will not be inappropriate, viz.: The agent's duty to make no profit out of the agency beyond his compensation or commission, and his duty to perform the service of the agency in person.

§ 181. **Same — To Make no Personal Profit.**— The agent is bound not to make any profit out of transactions into which he may enter on behalf of his principal in the course of the employment, other than the commission or compensation agreed upon between them. Such a failure by the agent to fulfill his obligations to his principal may take place in three ways, viz.: (1) He may accept reward from the other party to the transaction in which he is engaged, and thus may acquire an interest adverse to that of his employer. In other words, he may be bribed to make a bad bargain for his principal. Or (2) he may depart from his character as agent and assume that of principal, becoming the buyer of that which he is employed to sell, or the seller of that which he is employed to buy. Or (3) he may by taking advantage of his position as agent, and through the information he receives as such, make a profit or procure an advantage for himself.

(1) This case is an obvious fraud on the principal, and it is clear that he can neither recover the money promised, nor retain it even after it is paid over to him. Thus where an engineer in the employ of a railroad company was promised a commission by another company for the use of his influence with his employers to obtain an acceptance by them of a tender made by the latter company, it was held that he could not recover the amount promised. "It needs no authority," said the court, "to show that even though the

¹ Lawson Rights, Rem. & Pr., § 89; Souhegan Bk. v. Wallace, 61 N. H. 24.

employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced.”¹ In another case the agent was employed to purchase a ship. The vendor had promised his broker that he should have all that he got for the ship over £8,500, and the agent purchased the ship for his employer for £9,250, receiving from the broker by an arrangement with him the sum of £225, a part of the excess price. It was held that the purchaser was entitled to recover the £225 from his agent.²

(2) In this case there need be no actual fraud on the part of the agent, nevertheless it is well settled that if one is employed to buy or sell on behalf of another he may not sell to his employer or buy of him. Nor, if he is employed to bring his principal into contractual relations with others may he assume the position of the other contracting party.³ This rule of law is generally based on the fiduciary relation of agent and principal; the agent is bound to do the best he can for his principal; if he puts himself in a position in which he has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Or it may be based on the ground that if A employs B to make a bargain for him with some third party, the contract of employment is not fulfilled if B makes the bargain for himself. The employer may sustain no loss, but he has not got what he bargained for.⁴

¹ *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

² *Morrison v. Thompson*, L. R. 9 Q. B. 480.

³ *Ringo v. Burns*, 10 Pet. 289; *Smith v. Brotherline*, 62 Pa. St. 461; *Collins v. Rainey*, 42 Ark. 531; *Woodman v. Davis*, 32 Kan. 344; *Fountain Coal Co. v. Phelps*, 96 Ind. 271; *Ellsworth v. Cordrey*, 63 Ia. 675; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Armstrong v. Elliott*, 29 Mich.

485; *Follansbe v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Bain v. Brown*, 56 N. Y. 285; *Scott v. Mann*, 36 Tex. 157; *Mason v. Bauman*, 62 Ill. 76; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Gaines v. Allen*, 58 Mo. 541; *Collins v. Case*, 23 Wis. 230; *Tausig v. Hart*, 58 N. Y. 425.

⁴ On this second argument see *Sharman v. Brandt*, L. R. 6 Q. B. 730.

This fiduciary relation stands also in the way of one secretly acting as agent for both the parties to a contract when the matter requires the exercise of discretion and judgment.¹ The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent for the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to prosecute the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that the vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them.² A double agency may be undertaken with the consent of the principal and in certain cases it is customary to do so. Thus, brokers,³ or a middleman in an exchange,⁴ may act for both

¹ *Copeland v. Ins. Co.*, 6 Pick. 204; *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416; *Grant v. Hardy*, 33 Wis. 668; *Bollman v. Loomis*, 41 Conn. 581; *Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Mercantile Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408.

² *Bigelow, C. J.*, in *Farnsworth v. Hemmer*, 1 Allen, 494; 79 Am. Dec. 756.

³ *Rowe v. Stevens*, 3 Jones & S. 189; *Spyer v. Fisher*, 5 Jones & S. 93.

⁴ *Mullen v. Keetzleb*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 419; *Siegel v. Gould*, 7 Lans. 177; *Orton v. Schofield*, 61 Wis. 882; *Green v. Robertson*, 64 Cal. 75.

parties and receive compensation from each;¹ and so of course where each party has notice that he is acting for both and each agrees to pay him a commission.²

(3) The agent is not permitted to make any secret profit or advantage out of his agency, and all profits or advantages directly or indirectly made by him in the course of or in connection with his employment, whether in performance of or in violation of his duty belong to the principal.³ He will not be allowed to take advantage of information which he has acquired through his position to use it for his own benefit.⁴ In *Davis v. Hamlin*,⁵ an employee of a lessee of a theater, shortly before the lease expired, secretly procured a lease of the premises for a new term to himself at an advanced rent. It was held that the employer was entitled to the new lease, as he would be considered as holding it as trustee for him. "The renewal of the lease," said the court, "was obtained by a confidential agent in violation of the duty of his relation and acquired presumably because of peculiar means of knowledge of the profitableness of the business afforded him by the confidential position in which he was employed. A personal benefit thus obtained by an agent equity will hold to inure for the benefit of the principal."

§ 182. **Losses Fall on Principal.**—And because to the principal belong the profits, he must bear the losses which

¹ *Alexander v. University*, 57 Ind. 466; *Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Meyer v. Hanchett*, 39 Wis. 419.

² *Rowe v. Stevens*, 53 N. Y. 621; *Alexander v. Northwestern, etc., Co.*, 57 Ind. 466; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 523; *Joslin v. Cowee*, 56 N. Y. 628; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 450; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Capener v. Hogan*, 40 Ohio St. 203.

³ *Bain v. Brown*, 56 N. Y. 235; *Dodd v. Wakeman*, 26 N. J. (Eq.) 484; *Stoner v. Weiser*, 24 Ia. 434; *Leake v. Sutherland*, 25 Ark. 219; *Krutz v. Fisher*, 8 Kan. 90; *Molnett v. Days*, 1 Baxt. 431; *Rhea v.*

Purveyor, 26 Ark. 344; *Jaques v. Edgell*, 40 Mo. 76; *Bunker v. Miles*, 30 Me. 431; 50 Am. Dec. 632; *Pegram v. Charlotte, etc. R. Co.*, 84 N. C. 696; 37 Am. Rep. 639; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 698; *Miller v. L. & N. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722.

⁴ *Ringo v. Binns*, 10 Pet. 329; *Henry v. Ralman*, 25 Pa. St. 354; 64 Am. Dec. 703; *Gardner v. Ogden*, 23 N. Y. 327; 78 Am. Dec. 192; *Norris v. Tayloe*, 49 Ill. 17; 85 Am. Dec. 568; *Pegram v. Charlotte, etc. R. Co.*, 84 N. C. 698; 37 Am. Rep. 639; *Gower v. Andrew*, 59 Cal. 119; 43 Am. Rep. 242.

⁵ 108 Ill. 39; 48 Am. Rep. 541.

may occur in the course of the agency and which are not the result of the agent's lack of diligence or neglect of duty.¹

§ 183. **Agent May Not Delegate His Authority.** — The agent may not as a rule delegate to another person the power to do that which he has undertaken to do himself.² *Delegata potestas non potest delegari* is a maxim of the law for the reason that one who selects another to do an act for him relies on the skill and integrity of the person selected and cannot be presumed to intend that another not selected by him should exercise the authority conferred on the man of his choice.³ But the principal may authorize the delegation either directly or indirectly,⁴ and the authority may be implied from necessity, or the nature of the business,⁵ or from the usage of the particular trade.⁶ The delegation is likewise legal when the act delegated is a purely ministerial one and does not require the exercise of judgment and discretion.⁷ In *Weaver v. Carnall*,⁸ A authorized B to borrow money for him and sign his name to a note therefor. B borrowed the money and in his presence and at his request D signed the note in A's name. This was held valid. "An agent," said the court, "cannot delegate any portion of his power requiring the exercise of discretion or judgment; otherwise however as to powers and duties merely mechanical in their nature."

Where such authority exists either expressly or impliedly

¹ *D'Arcy v. Lyle*, 5 Binney, 441; *Richardson v. Futrell*, 42 Mass. 525.

² *Bocock v. Pavay*, 8 Ohio St. 270; *Warner v. Martin*, 11 How. 209; *Loeb v. Drakeford*, 75 Ala. 414; *O'Connor v. Arnold*, 53 Ind. 203; *Smith v. Sublett*, 28 Tex. 163; *Loomis v. Simpson*, 13 Ia. 552; *Bissell v. Roden*, 34 Mo. 63; 84 Am. Dec. 71; *Lyon v. Jerome*, 26 Wend. 483; 37 Am. Dec. 271; *Locke's Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716; *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319; *Hill v. Morris*, 15 Mo. App. 322; *McClure v. Miss. Valley Ins. Co.*, 4 Mo. App. 148; *Sheehan v. Gleeson*, 46 Mo. 100.

³ *Lawson Rights*, Rem. & Pr. § 26.

⁴ *Furnas v. Frankman*, 6 Neb. 429; *VanSchoich v. Niagara Ins. Co.*, 68 N. Y. 484; *Gray v. Murray*, 3 Johns Ch. 167.

⁵ *Dorchester Bk. v. New England Bk.*, 1 Cush. 177.

⁶ *Lawson Usages & Customs*, § 145.

⁷ *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Grady v. Am. Cent. Ins. Co.*, 60 Mo. 116; *Com. Bk. v. Norton*, 1 Hill. 501; *Eldridge v. Holway*, 18 Ill. 445; *Williams v. Woods*, 16 Md. 220.

⁸ 35 Ark. 196; 37 Am. Rep. 22.

and is duly exercised, privity of contract arises between the principal and the substitute and the latter becomes as responsible to the former for the due discharge of the duties which the employment casts on him as if he had been appointed by the principal himself.¹ The agent is liable for negligence in appointing the subagent but not for his negligent acts.² But where there is no such express or implied authority, and the agent employs a subagent for his own convenience no privity of contract arises between the principal and the subagent. On default of the agent the principal cannot intervene as an undisclosed principal to the contract between agent and subagent. Nor can he follow his property into the hands of the subagent as being his employer. And the agent will be liable to the principal for the subagent's negligence.³

(B) *Rights and Liabilities of the Parties Where Principal Named.*

§ 184. **Principal Bound, Agent Not.**—Where an agent acting within his authority makes a contract in the name of his principal, the latter is bound, and the agent incurs no personal liability whatever.⁴ And so where one contracts with or sells goods to the agent of a known principal, the principal and not the agent is liable on the contract, and for the price.⁵ But this rule does not apply where it is clear that the other party contracted upon the credit of the agent alone, and the principal was not either expressly or impliedly named as the person to be responsible.⁶ “In

¹ De Bussche v. Alt, 8 Oh. Div. 310.

² Warren Bk. v. Suffolk Bk., 10 Cush. 586; Tiernan v. Commercial Bk., 7 How. 648; 40 Am. Dec. 83; Bath v. Caton, 37 Mich. 199. But see Barnard v. Coffin, 141 Mass. 37; 55 Am. Rep. 443; Morgan v. Tener, 83 Pa. St. 305.

³ Barnard v. Coffin, 141 Mass. 37; 55 Am. Rep. 443.

⁴ Oelrichs v. Ford, 23 How. 49; Whitney v. Wyman, 101 U. S. 392; Michael v. Jones, 34 Mo. 578; Seery v. Socks, 29 Ill.

313; Frazier v. Hendren, 80 Va. 265; Simons v. Heard, 23 Pick. 120; 34 Am. Dec. 41; Hall v. Huntton, 17 Vt. 244; 44 Am. Dec. 332; Davis v. Burnett, 4 Jones, 71; 67 Am. Dec. 263; Rathbon v. Budlong, 15 Johns. 1.

⁵ Meeker v. Claghorn, 44 N. Y. 349; Ferris v. Kilmer, 43 N. Y. 302.

⁶ Ferris v. Kilmer, 48 N. Y. 313; Meeker v. Claghorn, 44 N. Y. 349; Butler v. Evening Mail Assn., 61 N. Y. 634.

the common case of an upholsterer employed to furnish a house, dealing himself in only one branch of business, he applies to other persons to furnish those articles in which he does not deal. These persons know the house is mine. That is expressly stated to him. But it does not follow that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case. A person instructs an attorney to bring an action, who employs his own stationer [to supply him with paper] generally employed by him. The client has nothing to do with the stationer, if the attorney becomes insolvent. The client pays the attorney. The stationer, therefore, has no remedy against the client."¹

Where the principal is named as the contracting party, the only questions which arise are as to (a) the nature and extent of the agent's authority, (b) the form of the contract, (c) the rights of the parties where the agent contracts beyond his authority.

(a) *Nature and Extent of Agent's Authority.*

§ 185. **General and Special Agency Distinguished.**—An agency is either general or special. A general agent is one who is authorized to transact all the business of his principal or all his business of a particular kind: a special agent is one who is authorized to act only in a particular transaction.² The only difference which arises out of this distinction is that all the restrictions upon the authority of the special agent take effect and the principal is not bound by his unauthorized acts, while in the case of a general agent all acts embraced in the delegation are valid as to third parties though directly opposed to the private instructions of the principal.³ But what is a special authority as between principal and agent may have the effect of a

¹ Lord Erskine in *Ex parte Hartop*, 13 Vesey, 352.

² *Farmers Bk. v. Butchers Bk.*, 16 N. Y. 148; 69 Am. Dec. 178.

³ *Lawson Rights, Rem. & Pr.*, §§ 1, 56.

general authority as to third persons, the rule being that while the principal is not bound by the act of a special agent beyond his authority, — third persons in dealing with such an agent, being bound to ascertain the limits of his authority — yet, where he has held out the agent as having a larger authority than he really possesses, he will be estopped from setting up the actual terms of his authority.¹ Therefore as to third persons the authority of the agent need not be express, but it may be implied from the performance with the knowledge of the principal of acts of a similar character.²

So the power to employ all the usual and necessary means to execute the authority with effect is an incident of every contract of agency,³ and the authority may be enlarged or restricted by the custom of the country or the usage of the trade or business in which he acts.⁴ And under extraordinary circumstances he may assume extraordinary powers.⁵

And certain powers are recognized by the courts to be vested in certain classes of agents, as for example:

§ 186. **Auctioneers.** — An auctioneer is an agent to sell goods at a public auction.⁶ He is primarily agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer,⁷ and he is so for the

¹ *Golding v. Merchant*, 43 Ala. 706; *Cocke v. Campbell*, 13 Ala. 286; *Kelly v. Fall Brook Coal Co.*, 4 Hun, 261; *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361; *Morton v. Scull*, 23 Ark. 289; *Oruzan v. Smith*, 41 Ind. 283; *Nelson v. Cowing*, 6 Hill, 336; *Hunter v. Jameson*, 6 Ired. 252; *Gallup v. Ledner*, 1 Hun, 283; *Kerslake v. Schoonmaker*, 1 Hun, 436; *St. Louis, etc., R. Co. v. Parker*, 59 Ill. 39; *Nixon v. Brown*, 57 N. H. 34; *Merchant's Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 685; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Lister v. Allen*, 31 Md. 543; 100 Am. Dec. 78.

² *Friedlander v. Cornell*, 45 Tex. 585; *Edwards v. Thomas*, 66 Mo. 463; *Hooe v. Oxley*, 1 Wash. 17; 1 Am. Dec. 425.

³ *Story v. Stewart*, 9 Helsk. 137; *McAlpin v. Cassidy*, 17 Tex. 449; *Merrick v. Wagner*, 44 Ill. 266; *Ahem v. Goodspeed*, 72 N. Y. 108; *Barns v. City of Hannibal*, 71 Mo. 449; *Williams v. Getty*, 31 Pa. St. 461; 72 Am. Dec. 757; *Huntley v. Mathias*, 90 N. C. 101; 47 Am. Rep. 517; *Bentley v. Doggett*, 51 Wis. 224; 87 Am. Rep. 827.

⁴ *Lawson Usages and Customs*, § 143, *et seq.*

⁵ *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604.

⁶ *Lawson Rights, Rem. & Pr.*, § 212.

⁷ *Smith v. Jones*, 7 Leigh, 165; 30 Am. Dec. 498; *Pike v. Balch*, 38 Me. 312; 61 Am. Dec. 248; *Johnson v. Buck*, 35 N. J. (L.) 338; 10 Am. Rep. 243; *Pugh v.*

purpose of the signatures of both parties within the fourth and seventeenth sections of the Statute of Frauds. He has not merely an authority to sell, but actual possession of the goods, and a lien upon them for his charges. He may sue the purchaser in his own name,¹ and may receive payment for them.² But he has no authority to purchase himself,³ nor to give a warranty,⁴ nor to sell on credit,⁵ nor to negotiate with the purchaser after the sale is made.⁶

§ 187. **Factors.** — A factor is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale.⁷ He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.⁸

§ 188. **Brokers.** — A broker is an agent employed to make bargains and contracts between other persons in matters of trade and commerce.⁹ Not having the possession of the goods he has not the wide authority of a factor.¹⁰

§ 189. **Del Credere Agents.** — A *del credere* agent is an agent for the *purpose of sale*, and in addition to this gives an undertaking to his employer that the parties with whom he is brought into contractual relations will perform the engagements into which they enter. He does not guarantee the solvency of these parties or promise to answer for their default; his undertaking does not fall within the

Chesseldine, 11 Ohio, 109; 37 Am. Dec. 414; Walker v. Herring, 21 Gratt. 678; 8 Am. Rep. 616; Doty v. Wilder, 15 Ill. 410; 60 Am. Dec. 756; Craig v. Godfrey, 1 Cal. 415; 54 Am. Dec. 299; Morton v. Dean, 13 Metc. 385.

¹ Beller v. Block, 19 Ark. 566; Thompson v. Kelly, 101 Mass. 291; 3 Am. Rep. 257.

² Yourt v. Hopkins, 24 Ill. 328.

³ Story on Agency, § 27; Brock v. Rice, 27 Gratt. 612.

⁴ The Monte Allegre, 9 Wheat. 645; Blood v. French, 9 Gray, 197.

⁵ Story on Agency, § 107.

⁶ Pinckney v. Hagadorn, 1 Duer, 89; Boineast v. Leignez, 2 Rich. 464.

⁷ Lawson Rights, Rem. & Pr., § 227.

⁸ *Id.*

⁹ Evans on Agency, § 4; Story on Agency, § 28.

¹⁰ Lawson Rights, Rem. & Pr., § 224.

statute of frauds, but is rather a promise of indemnity to his employer against his own inadvertence or ill-fortune in making contracts for him with persons who cannot or will not perform them.¹

§ 190. **Foreign Principal.** — In England in the case of an agent of a foreign principal the rule was that the credit was presumed to be given to the agent even where the principal was known.² The American courts after some hesitancy refused to apply this principle where the principal was simply a “foreigner” in the sense of residing in another state of the Union.³ And the well-established doctrine at the present day both in England⁴ and America is that the agent of a foreign principal is not, as matter of law, personally liable, but it is a question of fact for the jury, to be decided on the terms of the contract and the surrounding circumstances.⁵ In *Bray v. Kettell*⁶ a contract was entered into in New York for the sale of stone by the agent of A. F., who lived in New Brunswick, and was signed “A. F.” by K., “agent,” and it was held that K. was not bound. “The question is,” said Bigelow, C. J., “to whom credit was in fact given. When goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar and to process for the immediate enforcement of debt, rather than to a principal residing abroad, under a different system of laws and beyond the jurisdiction of the domestic forum.

¹ See note to 58 Am. Dec. 171.

² *Thompson v. Davenport*, 9 Barn. & C. 78; *Story on Agency*, § 268; *New Castle Mfg. Co. v. Red River R. R. Co.*, 1 Rob. (La.) 145; 35 Am. Dec. 686; *McKenzie v. Nivius*, 22 Me. 138; 38 Am. Dec. 291; except where the contract provided that the agent should not be bound; *Ogleby v. Yglesias*, 1 El. B. & E. 380; *Pederson v. Lotinga*, 28 L. T. Rep. 267.

³ *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. 254; *Vawter v. Baker*, 23 Ind. 63.

⁴ *Green v. Kopke*, 18 Conn. B. 549; *Armstrong v. Stokes*, L. R. 7 Q. B. 603; *Mahoney v. Kekule*, 14 Conn. B. 390.

⁵ *Oelricks v. Ford*, 23 How. 49; *Rogers v. March*, 33 Me. 106; *Goldsmith v. Manheim*, 109 Mass. 187.

⁶ 1 Allen, 80.

But even in such a case the fact that the principal is resident in a foreign country, is only one circumstance entering into the question of credit and is liable to be controlled by other facts. So in the case of a written contract: it depends on the intention of the parties. But this as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circumstance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent."

§ 191. Irresponsible or Non-Existent Principal. — Where he acts for an irresponsible principal — a principal against whom the creditor cannot proceed personally — the agent will be liable even though he contract as agent for a known and described principal.¹ Thus where the defendant signed a note "as guardian of B," the court said, "As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward. Unless, therefore, the defendant is liable to pay this note, the plaintiff has no remedy."² And the rule is the same in the case of a non-existent principal.

§ 192. Agent Cannot Sue. — An agent contracting as such, for a named principal, cannot sue upon a contract so made.³ The party with whom he contracted has presumably looked to the named principal, and cannot, unless he so choose, be made liable to one with whom he dealt merely

¹ *Thacher v. Dinsmore*, 5 Mass. 299; 4 Am. Dec. 61; *Blakely v. Benecke*, 59 Mo. 193.

² *Forster v. Fuller*, 6 Mass. 59; 4 Am. Dec. 87.

³ *Taintor v. Prendergast*, 3 Hill. 73; 38 Am. Dec. 618; *Kert v. Bornstein*, 13

Allen, 342; *Sharp v. Jones*, 18 Ind. 314; *Gunn v. Cantline*, 10 Johns. 387; *Doe v. Thompson*, 23 N. H. 217; *Garland v. Reynolds*, 20 Me. 45; *Gilmore v. Pope*, 5 Mass. 491; *Thompson v. Fargo*, 63 N. Y. 473; *Bayley v. Onondago Ins. Co.*, 6 Hill, 476; 41 Am. Dec. 759.

as a means of communication. But the agent may sue where he has made the contract in his own name for an undisclosed principal,¹ or where he has a special interest in the contract as a factor or an auctioneer.²

The right of the agent to sue is subordinate to and controllable by the principal. Where the principal as well as the agent has a right to sue upon a contract made by the latter he may generally supersede the right of the agent to sue by suing in his own name.³

(b) *Form of the Contract.*

§ 193. **Authority must be Executed in Name of Principal.** — The common law rule was that to bind the principal the agent must execute his authority in the name of the principal and not in his own.⁴ This rule though still applied with most of its strictness to instruments under seal,⁵ has as to other kinds of writings been much relaxed, and it may be laid down that if the name of the principal appear in such an instrument and the intention on the whole is to bind him, he will be bound though the agent sign only his own name;⁶ especially is this the case as to commercial contracts, negotiable paper and the like, the modern rule as to these being that if from the whole instrument it can be collected that the intention was to bind

¹ Ludwig v. Gillespie, 105 N. Y. 653; Keown v. Vogel, 25 Mo. App. 35; Sharp v. Jones, 18 Ind. 314; 81 Am. Dec. 359; Beebe v. Robert, 12 Wend. 413; 27 Am. Dec. 132.

² Lawson Rights, Rem. & Pr., § 124.

³ Story on Agency, § 403; Sadler v. Leigh, 4 Camp. 194; Taintor v. Prendergast, 3 Hill, 72; 38 Am. Dec. 618; Girard v. Taggart, 5 Serg. & R. 27; 9 Am. Dec. 327; Sargent v. Morris, 3 Barn. & Ald. 277; Morris v. Cleasby, 1 Maule & S. 576; Coppin v. Walker, 7 Taunt. 237; Walter v. Ross, 2 Wash. C. C. 283; Hubbert v. Borden, 6 Whart. 79.

⁴ Stackpole v. Arnold, 11 Mass. 27;

6 Am. Dec. 150; Abbey v. Chase, 6 Cosh. 54.

⁵ Lawson Rights, Rem. & Pr., § 100.

⁶ New England Ins. Co. v. De Wolf, 8 Pick. 56; Robertson v. Pope, 1 Rich. 501; 44 Am. Dec. 267; Farmers Bank v. City Bank, 1 Doug. (Mich.) 458; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521; Townsend v. Hubbard, 4 Hill, 351; Pinckney v. Hagadorn, 1 Duer, 89, 14 N. Y. 590; Evans v. Wells, 22 Wend. 324; Northwestern Distilling Co. v. Brant, 69 Ill. 658; 18 Am. Rep. 631; Douglass v. Branch Bank of Mobile, 19 Ala. 659; Sayre v. Nichols, 7 Cal., 535; 68 Am. Dec. 290; Webb v. Burke, 5 B. Mon. 51.

the principal, this construction will be adopted though the agent may not have used apt words to do so.¹

Merely signing a contract as "agent" will not prevent it from being a personal contract of the agent, the word "agent" in such a case being regarded as mere *descriptio personæ*.²

§ 194. **Agent May Bind Himself Personally.**—An agent, known as such, may if he pleases, bind himself personally.³ "A person who is acting for another,⁴ and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is that if the contract is by word of mouth it is not possible to say from the agent using the words "I" and "me" that he meant to bind himself personally; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and accordingly he is taken to do so. It is well settled that an agent is responsible though known by the other party to be an agent, if by the terms of the contract he makes himself the contracting party."

§ 195. **Liability of Agent Who Contracts Without Authority.**—Although there are decisions which hold an

¹ *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Pentz v. Stanton*, 10 Wend. 271; 25 Am. Dec. 556; *Stanton v. Camp*, 4 Barb. 274; *Elce v. Gove*, 22 Pick. 158; 33 Am. Dec. 724; *King v. Handy*, 2 Ill. App. 212; *Harkins v. Edwards*, 1 Iowa, 429; *Means v. Swormstedt*, 22 Ind. 87; 2 Am. Rep. 330; *Babcock v. Beman*, 11 N. Y. 200; *Key v. Parnham*, 6 Har. & J. 418; *Lacy v. Dubuque Co.*, 43 Iowa, 510; *Mott v. Hicks*, 1 Cow. 513; 13 Am. Dec. 550; *Merchants' Bank v. Hayes*, 7 Hun, 530; *Roberts v. Button*, 14 Vt. 195; *Mann v. Chandler*, 9 Mass. 335; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Davis v. Henderson*, 26 Miss. 549; 59

Am. Dec. 229; *Halle v. Peirce*, 32 Md. 327; 3 Am. Rep. 139.

² *Pentz v. Stanton*, 10 Wend. 271; 25 Am. Dec. 556; *Davis v. England*, 141 Mass. 587; *Collins v. Buckeye Ins. Co.*, 17 Ohio St. 215; 98 Am. Dec. 612; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Rand v. Hale*, 3 W. Va. 495; 100 Am. Dec. 761; *Williams v. Robbins*, 19 Gray, 77; 77 Am. Dec. 326.

³ *Simonds v. Heard*, 23 Pick. 125; 34 Am. Dec. 41; *Southard v. Stutevant*, 109 Mass. 290; *Collins v. Butts*, 10 Wend. 399; *Chandler v. Coe*, 54 N. H. 561; *Fisher v. Hagerty*, 36 Ill. 128.

⁴ *Williamson v. Barton*, 31 L. J. (Ex.) (N. S.) 174.

agent personally liable on a contract which he makes in the name of another without his authority,¹ they are clearly wrong, for it is not the business of courts to make contracts for parties which neither of them intended to make or would have consented to make.² The agent's liability, in such a case, is either upon an implied warranty of authority on his part when he acts in good faith, or upon the ground of fraud when he intentionally misrepresents his authority.³ The party contracted with has the right on learning the facts to repudiate the contract and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action would lie on the contract itself, and the damages are to be measured not by the contract but by the injury resulting from the agent's want of power.⁴

But it would be stating the rule rather too broadly to say that the agent is liable on this warranty of authority, even where he *bona fide* believes that he had the authority, though this would seem to be the doctrine of the leading English case.⁵ If he enters into the contract as the agent of another and does so honestly, at the same time fully disclosing all the facts touching his authority, so that the person contracting is fully informed of the authority possessed or claimed by him, he does not become personally liable if it turns out that he really had no authority. But if he carelessly assumes to act without being authorized, or conceals the true state of his authority so that the party contracting is induced to rely on the assumption of the authority, he will be liable.⁶ For example A says to B: "This is my

¹ *Weaver v. Gove*, 44 N. H. 106; *Mitchell v. Hazen*, 4 Conn. 493; 10 Am. Dec. 169; *Hampton v. Speckenagle*, 9 S. & R. 212; 11 Am. Dec. 706; *Gillaspie v. Wesson*, 7 Port. 454; 31 Am. Dec. 715; *Collins v. Allen*, 12 Wend. 356; 27 Am. Dec. 130.

² See *White v. Madison*, 28 N. Y. 117.

³ *White v. Madison*, 28 N. Y. 117; *Harper v. Little*, 2 Greenl. 14; 11 Am. Dec. 25; *Simpson v. Garland*, 70 Me. 206;

Duncan v. Niles, 32 Ill. 532; 83 Am. Dec. 236; *Sheffield v. Ladue*, 16 Minn. 338; 10 Am. Rep. 145; *Collen v. Wright*, 8 El. & Bl. 647; *Jefts v. York*, 4 Cush. 371; 50 Am. Dec. 791; *Lander v. Castro*, 43 Cal. 497.

⁴ *White v. Madison*, 28 N. Y. 117; *Bird v. Daggett*, 97 Mass. 494.

⁵ *Collen v. Wright*, 8 El. & Bl.

⁶ *Newman v. Sylvester*, 43 Ind. 106;

authority from C to act for him; you can take it for what it is worth," and B thinks it sufficient, and there is no concealment on A's part, here the latter cannot be held on any implied warranty of authority.¹ And for the same reason when the agent's authority has been revoked by the death of the principal unknown to both parties, the agent is not liable.²

But of course where the professed agent knew that he had not the authority he assumed to possess, he may be sued by the injured party for the damage suffered by him from the fraud, *i. e.*, the making of a representation false to his knowledge.³

To render the agent liable it is essential that the unauthorized contract was one which would have bound the principal had the authority existed.⁴ Thus in *Dung v. Parker*,⁵ A, falsely representing himself as authorized to do so by B, made a parol contract for the lease of B's store to C, for the term of two years. C thereupon incurred expense in procuring fixtures for the store, but the contract was not binding on B, even if A had been authorized. It was held that no action lay against A for the damage. And where the principal is liable notwithstanding the agent's want of authority, no action will lie against the agent.⁶ In *Bird v. Daggett*,⁷ an agent of a corporation was authorized to sign "all notes and business paper of the corporation." He gave accommodation notes for other purposes in the corporation's name, which passed into the hands of a *bona fide* holder for value. It was held that notwithstanding his want of authority, the corporation was liable on the notes and the agent could not be sued. "The plaintiff," said the court, "as a *bona fide* holder for

Tiller v. Spradley, 39 Ga. 35; *McCubbin v. Graham*, 4 Kan. 397; *Carriger v. Whittington*, 26 Mo. 311; 73 Am. Dec. 212; *Ogden v. Raymond*, 23 Conn. 379; 58 Am. Dec. 429.

¹ See Wharton on Agency, § 580.

² *Smout v. Illberry*, 10 M. & W. 1.

³ *Polhill v. Walter*, 3 B. & Ad. 114.

⁴ *Baltzen v. Nicolay*, 53 N. Y. 467; *Bozza v. Rowe*, 30 Ill. 196; 83 Am. Dec. 184.

⁵ 52 N. Y. 494.

⁶ *Landan v. Proctor*, 39 Vt. 73.

⁷ 97 Mass. 494.

value of notes taken before maturity, can recover against the corporation, notwithstanding any want of authority of the agent to execute these particular notes for the purposes for which they were given. For the defendant was expressly authorized to sign all notes and business paper of the company. The plaintiff therefore in valid notes against the corporation has all that he expected to obtain and all that the defendant undertook to give. What injury then has he sustained? The notes cannot be at once binding upon the corporation and the agent. The representation of the agent's authority to give them for the company whether made expressly or merely implied, from the mode of signature, was consequently immaterial. The tort of an agent who has falsely assumed authority which he did not have, is a proper subject for special action, in which damages will be recovered according to the injury sustained.¹ The measure of damages is not necessarily the precise amount of the notes. Where as in the present case the plaintiff has suffered nothing, he can recover nothing." So if the agent's unauthorized act is ratified by the principal, he cannot be personally held.²

(C) *Rights and Liabilities of Parties where Principal not Named.*

§ 196. **Liability where Principal Unnamed but Agency Disclosed.** — Where an agent contracts as agent but does not disclose the name of his principal, the rights and liabilities of agent and principal as regards the other party to the contract depend on the construction of its terms. It may be stated generally that a person who describes himself as an agent in the contract and signs himself as such, protects himself from personal liability even though the name of his principal is not given.³ But as the word

¹ *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146.

² *Sheffield v. Ladue*, 16 Minn. 388; 10 Am. Rep. 145.

³ *Fleet v. Murton*, L. R. 7 Q. B. 126

"agent" attached to a signature is regarded as merely *descriptio personæ*¹ it is better that the agent should (if he desires to avoid a personal responsibility) disclose the name of his principal and declare that he is acting for him.²

§ 197. **Liability Where Agency Undisclosed.**—If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party may hold and look to the agent personally and is entitled on discovering who the principal is to elect whether he will treat principal or agent as the party with whom he dealt. If A enters into a contract with B he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that B is in fact the representative of C he is entitled to choose whether he will accept the actual state of things, and sue C as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat B as the principal party to it.³ But nothing must have occurred in the meantime to alter the relations of the parties, and the creditor must not have been guilty of laches.⁴

And this right of the other contracting party to avail himself of this alternative liability cannot be exercised (a) where the agreement is in such terms that the idea of agency is incompatible with the construction of the contract;⁵ (b)

¹ Williams v. Robbins, 16 Gray, 77; 77 Am. Dec. 396; De Witt v. Walton, 9 N. Y. 571.

² Murphy v. Helmrich, 66 Cal. 69; Wheeler v. Reed, 36 Ill. 82; Kean v. Davis, 20 N. J. (L.) 425; Texas Land, etc., Co. v. Carroll, 63 Tex. 48.

³ McClellan v. Parker, 27 Mo. 162; Malone v. Morton, 84 Mo. 436; Bartlett v. Raymond, 139 Mass. 275; Merrill v. Wilson, 6 Ind. 426; Royce v. Allen, 28 Vt. 234; Pierce v. Johnson, 34 Conn. 274; Beymer v. Bonsall, 79 Pa. St. 298; Cobb v. Knapp, 71 N. Y. 348; Welch v. Goodwin, 123 Mass. 71; 25 Am. Rep.

24; Cottom v. Holliday, 59 Ill. 176; Baldwin v. Leonard, 39 Vt. 260; 94 Am. Dec. 324; Nixon v. Downey, 49 Ia. 166; Wolfey v. Rising, 8 Kan. 297; Brent v. Miller, 81 Ala. 307; Kingsley v. Davis, 104 Mass. 178; Meeker v. Claghorn, 44 N. Y. 349; Merrill v. Kenyon, 48 Conn. 314; 40 Am. Rep. 174.

⁴ Rathborn v. Tucker, 15 Wend. 488; Hooper v. Robinson, 97 U. S. 528; Thomas v. Atkinson, 38 Ind. 248.

⁵ As where an agent in making a charter-party described himself therein as owner of the ship it was held that he could not be regarded as agent, that

where the other party to the contract, after having discovered the existence of the undisclosed principal, does anything unequivocally indicating that he adopts either principal or agent as the party liable to him;¹ (c) where knowing at the time of a sale the principal and that the buyer is a mere agent, he gives the credit to the agent.² But it is held that the other party must have actual knowledge, means of ascertaining the fact not being enough;³ nor is it sufficient that the seller knew that the buyer was an agent, if he did not know who the principal was.⁴

§ 198. **Liability for Frauds and Torts.**—The principal is liable for the frauds, deceits and negligent acts of his agent in the course of his employment, whether authorized by him or not.⁵ A man is equally liable for the negligence of his coachman who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods.⁶ But if the person employed act beyond the scope of his employment he no longer represents his employer to bind him by tort or contract.⁷

his principal could not intervene, nor could, by parity of reasoning, be sued. *Humble v. Hunter*, 12 Q. B. 310.

¹ That is to say, he can elect only once which one he will hold. *Jones v. Aetna Ins. Co.*, 14 Conn. 501; *Kingsley v. Davis*, 104 Mass. 178; *Coleman v. First Nat. Bk.*, 53 N. Y. 388; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51.

² Here he can only sue the agent. *Paterson v. Gandasequi*, 15 East, 62; *Raymond v. Crown Mills*, 2 Metc. 324; *Paige v. Stone*, 10 Metc. 160.

³ *Raymond v. Crown Mills*, 2 Metc. 324; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51.

⁴ *Thompson v. Davenport*, 9 B. & C. 78; *Irvine v. Watson*, 5 Q. B. Div. 107.

⁵ *Lobdell v. Baker*, 1 Metc. 193; 35 Am. Dec. 358; *Durst v. Burton*, 47 N. Y.

167; 7 Am. Rep. 428; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *Wolfe v. Pugh*, 101 Ind. 238; *Stroher v. Elting*, 97 N. Y. 102; *Johnson v. Barber*, 10 Ill. 435; *Smith v. Tracy*, 36 N. Y. 79; *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476; *Henderson v. Railroad Co.*, 17 Tex. 560; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; 24 Am. Rep. 447; *Rhoda v. Annis*, 75 Me. 17; 46 Am. Rep. 334; *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60; 90 Am. Dec. 407; *Locke v. Stearns*, 1 Metc. 560; 35 Am. Dec. 382; *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678; *Wright v. Calhoun*, 19 Tex. 430; *Kline v. E. R. Co.*, 37 Cal. 400; 99 Am. Dec. 228.

⁶ *Anson Contr.*, p. 354.

⁷ *Udell v. Atherton*, 7 H. & N. 173; *Cantrell v. Colwell*, 3 Head, 471.

As to the agent's liability it may be laid down that if the agent commits a fraud in the course of his employment, he is liable, and so is his principal, while if he commits a fraud outside the scope of his authority, he is liable, but not his principal.¹ On the other hand, as to acts of mere negligent omission, whereby another person is injured, the agent is not personally responsible. Under the maxim *respondent superior*, the principal is liable for the injury, with a right over against the agent.²

III

THE DETERMINATION OF THE AGENT'S AUTHORITY.

§ 199. **Introductory.** — An agent's authority may be terminated and the agency brought to an end in any of three ways. 1. By agreement of both parties. 2. By the act of one of the parties. 3. By operation of law.

§ 200. **By Agreement.** — Since the relation of principal and agent is that of employer and employed, a relation founded on mutual consent, it follows that the relation may be brought to a close by the same process which originated it, *viz.*, the agreement of the parties. At any time in the course of the agency the parties may by express agreement rescind the contract of agency. So where by the original contract, the agency is limited to a definite object or a definite time, the performance of the object or the expiration of the time dissolves the agency.³ Thus, where A appointed B, his agent, to sell machines for him, the agreement providing that A would furnish B "such number of machines as B

¹ *Spraghts v. Hawley*, 89 N. Y. 441; 100 Am. Dec. 452; *Hedden v. Griffin*, 138 Mass. 229; 49 Am. Rep. 25; *Reed v. Peterson*, 91 Ill. 297.

² *Colvin v. Holbrook*, 2 N. Y. 129; *Dehanev v. Rochereau*, 34 La. Am. 1123; 44 Am. Rep. 456; *Brown Paper Co. v. Dean*, 123 Mass. 267; *Labadie v. Hawley*, 61

Tex. 177; 48 Am. Rep. 278; *Dayton v. Rease*, 4 Ohio St. 80.

³ *Moore v. Stone*, 40 Iowa, 239; *Bradford v. Bush*, 10 Ala. 386; *Walker v. Derby*, 5 Biss. 134; *Smith v. Rice*, 1 Bailey (S. O.), 648; *Foster v. Calhoun*, Dual (S. O.), 75; *Reid v. Latham*, 40 Conn. 454; *Schlater v. Wimpenny*, 75 Pa. St. 321; *Short v. Millard*, 68 Ill. 292.

might be able to sell as his agent prior to October 1st, 1867," it was ruled that the agency continued only to October 1st.¹

§ 201. **By Act of One of the Parties.**—The principal may at any time before its performance revoke the authority of his agent at his pleasure,² even though the appointment expressly states that it is irrevocable.³ Where A gives B an order but countermands it before it is acted on he is not responsible for what B does under it.⁴ In California a person who had promised an agent a certain sum if he found a purchaser for his land within a month revoked the agent's authority. Before the expiration of the month but after the revocation the agent found a purchaser. It was held that the agent could not recover the sum promised.⁵ And though the agent is appointed under seal his authority may be revoked by parol.⁶

The revocation may be implied as well as expressed—as for example, appointing another person to do the same act.⁷ So giving a general power to the agent where he before had only a special power will revoke the latter,⁸ though giving an additional power to one of two agents will not revoke the authority of the other.⁹ Where a person sent a note to a bank for collection and afterwards demanded it back,¹⁰

¹ *Gundlach v. Fisher*, 59 Ill. 172.

² *Peacock v. Cummings*, 46 Pa. St. 434; *Coffin v. Landis*, 46 Pa. St. 426; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Wells v. Hatch*, 43 N. H. 247; *Chambers v. Seay*, 73 Ala. 372; *Trust v. Repoor*, 15 How. Pr. 570; *Pickler v. State*, 18 Ind. 266; *Gibbons v. Gibbons*, 4 Harr. 105; *Jacobs v. Warfield*, 23 La. Ann. 396; *Brookshire v. Voncannon*, 6 Ind. 231; *Brown v. Pffor*, 38 Cal. 550; *Phillips v. Howell*, 60 Ga. 411; *Lewis v. Sawyer*, 44 Me. 332; *Simonton v. Minneapolis Bk.*, 24 Minn. 216; *Gates v. Davenport*, 29 Barb. 190; *Evans v. Fearn*, 16 Ala. 689; 50 Am. Dec. 197; *Phillips v. Howell*, 60 Ga. 411; *Walker v. Dennison*, 86 Ill. 142; *Howard College v. Pace*, 15 Ga. 498.

³ *Knapp v. Alvord*, 10 Paige, 205; 40 Am. Dec. 241; *Marfield v. Douglas*, 1 Sand. 380; *McGregor v. Gardner*, 14 Ia. 326; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Walker v. Dennison*, 86 Ill. 142.

⁴ *Tucker v. Lawrence*, 56 Vt. 467.

⁵ *Brown v. Pffor*, 38 Cal. 550.

⁶ *Pickler v. State*, 18 Ind. 216; *Brookshire v. Brookshire*, 8 Ired. 74; 47 Am. Dec. 341.

⁷ *Copeland v. Ins. Co.*, 6 Pick. 108; *Wallace v. Gould*, 91 Ill. 15; *Reid v. Latham*, 40 Conn. 452.

⁸ *Rapier v. La. Eq. Ins. Co.*, 57 Ala. 101.

⁹ *Cushman v. Glover*, 11 Ill. 600; 53 Am. Dec. 461.

¹⁰ *Potter v. Merchants' Bk.*, 28 N. Y. 641; 86 Am. Dec. 278.

and where a man employed another to sell some property for him and afterwards sold it himself,¹ it was held in both cases that the authority given had been revoked by the act of the principal.

The agency may be dissolved by the renunciation of the agent,² or by his misconduct.³ But if the agency has been undertaken either for a valuable consideration or gratuitously the agent, by renouncing it before the end of the term, will be liable for such damages as the principal may suffer thereby.⁴

§ 202. **By Operation of Law.** — The dissolution of the relation of principal and agent may occur (a) by the death of the principal; (b) by the death of the agent; (c) by the bankruptcy of the principal; (d) by the bankruptcy of the agent; (e) by marriage; (f) by the insanity of the principal; (g) by the insanity of the agent; (h) by the destruction of the subject-matter of the agency; (i) by war; or (j) by other special circumstances.

(a) *The death of the principal* revokes the agent's authority.⁵ In *Jones v. Beall*,⁶ B having been stabbed by L, requested his brother, to employ counsel and prosecute

¹ *Terre v. Thiele*, 25 La. Am. 418.

² *Case v. Jennings*, 18 Tex. 661; *Barrows v. Cushman*, 37 Mich. 481; *Conroy v. Brandegee*, 2 La. Ann. 132; *Coffin v. Landis*, 5 Phila. 176.

³ *Henderson v. Hydraulic Works*, 9 Phila. 100; *Case v. Jennings*, 17 Tex. 661; *Stoddard v. Key*, 62 How. Pr. 187.

⁴ *Gill v. Middleton*, 105 Mass. 479; *White v. Smith*, 6 Lans. 5; *Benden v. Manning*, 2 N. H. 289; *Thorne v. Deas*, 4 Johns. 84; *Barrows v. Cushman*, 37 Mich. 481; *U. S. v. Jarvis, Daviess*, 274; *Evans' Agency*, 86.

⁵ *Johnson v. Wilcox*, 25 Ind. 182; *Darr v. Darr*, 59 Ia. 81; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 649; *Huston v. Cantrel*, 11 Leigh, 136; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *McDonald v. Black*, 20 Ohio, 185; 55 Am. Dec. 448; *Easton v. Ellis*, 1 Handy, 70; *Wil-*

son v. Edmonds, 24 N. H. 517; *Boone v. Clark*, 3 Oranch C. C. 389; *Bank of Washington v. Pierson*, 2 Wash. C. C. 685; *Scruggs v. Drover*, 51 Ala. 274; *McGriff v. Porter*, 5 Fla. 373; *Smith v. Smith*, 1 Jones (L.), 135; 59 Am. Dec. 581; *Clayton v. Merrett*, 52 Miss. 353; *Lehigh Coal Co. v. Mohr*, 83 Pa. St. 238; *Lincoln v. Emerson*, 108 Mass. 87; *Davis v. Windsor Sav. Bk.*, 46 Vt. 728; *Hunt v. Rousmaniere*, 8 Wheat. 174; *Lewis v. Kerr*, 17 Iowa, 83; *Primm v. Stewart*, 7 Tex. 178; *Gale v. Tappan*, 12 N. H. 145; 37 Am. Dec. 195; *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Coney v. Saunders*, 28 Ga. 511; *Saltmarsh v. Smith*, 32 Ala. 407; *Salt v. Galloway*, 4 Pot. 833; *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578.

⁶ 19 Ga. 171.

L for the offense; and told him that whether he lived or died he should be paid. B died and after his death his brother employed counsel and prosecuted L and paid his bill, to recover which sum he brought his action against B's administrator. It was held that B, dying before the brother had acted on his request, the request was revoked.

This rule however only applies to acts which must be done in the name of the principal, and not to those which the agent may do in his own name.¹ And the authority of a subagent which comes from the principal is not affected by the death of the agent from whom he received the appointment.²

(b) *The death of the agent* terminates the agency,³ and when the authority is given to two the death of one terminates it as to the other also.⁴ But the death of an agent does not generally affect the authority of a subagent.⁵

(c) *On the bankruptcy of the principal* the authority of the agent ceases, and he has no authority after that to receive or pay the principal's money.⁶ It is otherwise, however, as to property or rights which do not pass from the bankrupt by the bankruptcy but continue to remain in him.⁷

(d) *The bankruptcy of the agent* dissolves the agency,⁸ except as to the execution of mere formal acts which pass no interest.⁹

(e) *The marriage of the principal* has been held to revoke the agency in the case of an authority given by a

¹ Lawson Rights, Rem. & Pr., § 46; Dick v. Page, 17 Mo. 234; 57 Am. Dec. 267.

² Smith v. White, 5 Dana, 376.

³ Merrick's Estate, 8 W. & S. 402; Jackson Ins. Co. v. Parlee, 9 Helsk. 296; City Council v. Duncan, 3 Brev. 386; Gage v. Allison, 1 Brev. 495; 2 Am. Dec. 682; Shiff v. Lessepps, 22 La. Ann. 135; Judson v. Love, 35 Cal. 463.

⁴ Hartford Ins. Co. v. Wilcox, 57 Ill. 180; Martine v. Ins. Co., 63 Barb. 181; 53 N. Y. 339; 13 Am. Rep. 529.

⁵ Smith v. White, 5 Dana, 376. See Lawson Rights, Rem. & Pr., § 47.

⁶ Evans' Agency, 89; Re Daniels, 13 Nat. Bk. Reg. 46; Parker v. Smith, 16 East, 384; Ogden v. Gillingham, Bald. 88.

⁷ Story on Agency, § 482; Wharton on Agency, § 98. See Rice v. Barnard, 137 Mass. 241.

⁸ Audenried v. Betteley, 8 Allen, 302.

⁹ Story on Agency, § 486; Evans' Agency, § 92.

*feme sole*¹ and where a single man gave a power of attorney to sell his home, it was held revoked by his marriage.² But the *marriage of the agent* does not affect the agency.³

(f) *The insanity of the principal* revokes the agency,⁴ provided that it was of the degree which would prevent him from making a valid contract.

(g) *The insanity of the agent* revokes the authority, as it could not be imagined that a principal could intend to be represented by one unable to contract for himself.⁵

(h) *Whenever the subject-matter itself* or the principal's power over it ceases or goes out of existence, the agency is at an end.⁶ Thus if the agent is commissioned to sell a ship which is subsequently destroyed by fire, or a race horse which dies, in all these cases his authority is at an end.⁷ So, where the inhabitants of a town authorized the treasurer to borrow money to pay a certain tax, but the tax was subsequently adjusted without the loan, it was held that the authority of the agent to borrow ceased thereon.⁸ Where a person employs several agents to sell his land, and one of them sells it, this is a revocation of the authority of the others.⁹ So, where an agent is employed to sell property and sells it to himself, it is a revocation.¹⁰ So, although a guardian may appoint an agent to act for his ward, on the coming of age of the ward the authority would be revoked.¹¹

(i) *War between the country of the principal and that of the agent* terminates the agency according

¹ *McCann v. O'Fewall*, 8 C. & F. 30; *Obarnley v. Winstanley*, 5 East 26; *Wamhale v. Foot*, 2 Dak. 1; see *Reynolds v. Bowley*, 2 La. Ann. 890.

² *Henderson v. Lord*, 46 Tex. 628.

³ *Story on Agency*, § 486; *Wharton on Agency*, § 108.

⁴ *Motley v. Head*, 43 Vt. 633; *Matthiessen v. McMahon*, 38 N. J. (L.) 637; *Hill v. Day*, 34 N. J. (Eq.) 150; *Davis v. Lane*, 10 N. H. 156; *Willis v. Manhattan Co.*, 2 Hall, 495.

⁵ *Story on Agency*, § 407; *Evans' Agency*, 100.

⁶ *Gilbert v. Holmes*, 64 Ill. 548; *Bissell v. Terry*, 69 Ill. 184; *Walker v. Denison*, 86 Ill. 142; *State v. Walkor*, 88 Mo. 279.

⁷ *Evans' Agency*, 100.

⁸ *Benoit v. Conway*, 14 Allen, 528.

⁹ *Ahern v. Baker*, 34 Minn. 98.

¹⁰ *Toole v. Thiele*, 25 La. Ann. 418.

¹¹ *Wharton Agency*, § 100.

to some authorities;¹ while according to others it does not.²

(j) The dissolution of a partnership revokes an agency;³ or a change in the firm by the admission of new partners;⁴ but not a mere change in the firm name.⁵ The authority of an attorney at law is not terminated by the dissolution of the partnership of which he is a member,⁶ though it is held to be at an end by his removal or suspension from his office of attorney,⁷ or by his ceasing to act as attorney or to reside in the State.⁸

§ 203. *Time at which Revocation Takes Effect.* — A revocation by the principal of the agent's authority takes effect as between principal and agent at the moment the agent receives notice of it,⁹ but as to third persons it has no effect until it is made known to them.¹⁰ Acts done after the revocation of his agency bind both his principal and himself so far as they regard third persons who have had no notice of the revocation.¹¹ When an agent's authority

¹ *Simonton v. Olark*, 65 N. C. 525; 6 Am. Rep. 752; *Howell v. Gordon*, 40 Ga. 302; *Conley v. Burson*, 1 Heisk. 145; *Ins. Co. v. Davis*, 96 U. S. 425; *Blackwell v. Willard*, 65 N. O. 555; 6 Am. Rep. 742.

² *Maloney v. Stephens*, 11 Heisk. 738; *Jones v. Harris*, 10 Heisk. 98; *Darling v. Lewis*, 11 Heisk. 125; *Robinson v. International Ins. Co.*, 42 N. Y. 54; 1 Am. Rep. 490; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614; 3 Am. Rep. 218; *Murrell v. Jones*, 40 Miss. 565; *Shelby v. Offutt*, 51 Miss. 128.

³ *Schlater v. Winpenny*, 75 Pa. St. 321.

⁴ *Callanan v. Van Vleck*, 36 Barb. 324.

⁵ *Billingsly v. Dawson*, 27 Ia. 210.

⁶ *Weets Attorneys*, § 191; *Lawson Rights, Rem. & Pr.*, § 164.

⁷ *Weeks Attorneys*, § 248.

⁸ *Chautauqua Bk. v. Risley*, 8 Hill, 375; *Jones v. U. S.*, 15 Ct. of Cl. 240.

⁹ *Story on Agency*, § 470; *Nelle v. U. S.*, 7 Ct. of Cl. 535; *Jones v. Hodgkins*, 61 Me. 480; *Robertson v. Cloud*, 47 Miss. 208. A letter, for example, written by his principal revoking the agency is received

by the agent on Wednesday though it was written and mailed on Monday. The agency is not dissolved until Wednesday. *Robertson v. Cloud*, 47 Miss. 208.

¹⁰ *Tier v. Lampson*, 35 Vt. 179; 82 Am. Dec. 634; *Van Dusen v. Star Min. Co.*, 36 Cal. 571; 95 Am. Dec. 209; *Diversy v. Kellogg*, 44 Ill. 114; 92 Am. Dec. 154; *Capen v. Pac. Mut. Ins. Co.*, 25 N. J. (L.) 67; 64 Am. Dec. 412; *Rice v. Barnard*, 127 Mass. 241; *Rice v. Isham*, 4 Abb. App. Dec. 37; *Meyer v. Hebner*, 96 Ill. 400; *Braeswell v. Ins. Co.*, 75 N. C. 8; *Ulrich v. McCormick*, 66 Ind. 243; *Clafin v. Lenheim*, 66 N. Y. 301; *McNeilly v. Continental Ins. Co.*, 66 N. Y. 23; *Robertson v. Cloud*, 47 Miss. 208; *Beard v. Kirk*, 11 N. H. 397; *Wright v. Herrick*, 128 Mass. 240; *Hatch v. Ooddington*, 95 U. S. 48; *Barkley v. E. Co.*, 71 N. Y. 205.

¹¹ *Lamothe v. St. Louis R. Co.*, 17 Mo. 204; *Beard v. Kirk*, 11 N. H. 398; *Hancock v. Byrne*, 5 Dana, 514; *Edie v. Ashbaugh*, 44 Ia. 519.

has been withdrawn, but parties owing the principal pay their debts to the agent, not knowing of the revocation, the payments bind the principal.¹ In *Fellows v. Hartford Steamboat Co.*,² the defendants, a steamboat company, had employed A as steward on one of their boats, and A had, while so employed, purchased of the plaintiffs and others supplies for the boat by authority of the defendants and on their credit. The defendants afterwards ceased to employ A as steward and advertised for proposals for contracts to board their officers and crews at a fixed price per week and to furnish the passengers' table, the contractors to furnish all the supplies at their own expense, and entered into such a contract with A for one of their boats, and into a similar contract with B for another boat. The defendants gave no notice to the plaintiffs of the change in the manner of victualling their boats and did not advertise such change except by advertising for proposals as above. A and B, afterwards, without the knowledge of the defendants, purchased supplies for their respective boats of the plaintiffs who were ignorant of their contracts with the defendants, and the goods so purchased were by the direction of A and B charged to the defendants; it was held that the defendants were liable for the goods purchased by A but not for those purchased by B.

But where the agent is a special one having authority to do only a particular act, notice to third parties of the revocation is not necessary.³ And third persons have no right to conclude that a new agency has been established after they have been notified by the principal that the former agency has ceased, from the fact that the agent is conducting business as formerly.⁴

As to the time when the revocation by the death of the principal takes effect, the rule, as established by the great

¹ *Packer v. Hinckley*, 122 Mass. 484;
Insurance Co. v. McCain, 96 U. S. 84.

² 38 Conn. 197.

³ *Watts v. Kavanaugh*, 25 Vt. 84.

⁴ *Van Dusen v. Mining Co.*, 36 Cal.
571; 95 Am. Dec. 210.

weight of authority, is that the revocation is instantaneous both as to the agent and third parties, even as to acts of the agent before he obtains knowledge of the decease.¹ This doctrine has been much criticised.² The effect is to leave the third party without a remedy upon contracts entered into by the agent when ignorant of the death of his principal. The agent is not personally liable, as having contracted on behalf of a non-existent principal; for the agent had once received an authority to contract. Nor is he liable on a warranty of authority for he had no means of knowing that his authority had determined. Nor is the estate of the deceased liable; for the authority was given for the purpose of representing the principal and not his estate. The case seems a hard one, but so the law stands in most of the States. In a few States, however, the more reasonable rule is adopted that acts *bona fide* executed by the agent before notice of his death, and which do not require to be done in the principal's name, are valid in favor of innocent parties.³

As to persons who have dealt with an agent in ignorance of his principal's insanity, the courts are inclined to uphold such transactions and consider them binding upon the principal.⁴ And an agent who knowing that the principal was insane continued to exercise an authority

¹ *Clayton v. Merritt*, 52 Miss. 353; *Rigs v. Cage*, 2 Humph. 350; 37 Am. Dec. 559; *Gale v. Tappan*, 12 N. H. 145, 37 Am. Dec. 194; *Harper v. Little*, 2 Me. 14; 11 Am. Dec. 25; *Smout v. Iberry*, 10 M. & W. 1; *Galt v. Galloway*, 4 Pet. 382; *Clark v. Courtney*, 5 Pet. 319; *Ferris v. Irving*, 28 Cal. 645; *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Scruggs v. Diver*, 31 Ala. 274; *Gleason v. Dodd*, 4 Metc. 383; *Nichols v. Chapman*, 9 Wend. 452; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 648; *Davis v. Windsor Bk.*, 46 Vt. 728.

² See an able article in 6 Cent. L. J. 385.

³ *Cassiday v. McKenzie*, 4 W. & S. 282; 39 Am. Dec. 76; *Welson v. Stew-*

art, 5 Pa. L. J. 450; *Dick v. Page*, 17 Mo. 234; 57 Am. Dec. 267; *Cariger v. Whittington*, 26 Mo. 204; *Ish v. Orane*, 8 Ohio St. 530. And see *Bank of New York v. Vanderhorst*, 32 N. Y. 553. By statute in several States payments made to an agent in ignorance of the principal's death are valid. R. O. Md. 1878, art. 44, § 31; *Dakota Civ. Code*, 1893; *Louisiana R. C. (Voorhies)* 1875, arts. 3032, 3033; *Georgia R. S.* 1875. See *Coney v. Saunders*, 28 Ga. 511; *Cal. Civ. Code*, § 2356; *N. C. Stat.* 1803.

⁴ *Davis v. Lane*, 10 N. H. 156; *Morley v. Head*, 48 Vt. 633; *Matthiessen v. McMahon*, 38 N. J. L. 537; see *Drew v. Nunn*, L. R. 42 B. 689.

once given by him, might be sued on a warranty of authority.¹

§ 204. **Authority Coupled with Interest or on Consideration.**—All the modes of revocation of authority which we have just examined apply only to mere naked powers over which the principal has absolute control, and not to powers coupled with an interest or such as are made upon sufficient consideration or for the mutual benefit of the parties.² It is laid down as a general rule that an authority coupled with an interest is not revocable either by the act of the principal,³ or by his death,⁴ bankruptcy,⁵ marriage,⁶ or insanity,⁷ or in any other mode. As to what amounts to an interest it is said in *Smart v. Sanders*:⁸ “Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest and which is commonly said to be irrevocable.” An assignment of property in trust to be distributed among creditors,⁹ a power to collect a debt to secure advances made by the

¹ Anson Contr. 360.

² Wassell v. Beardon, 11 Ark. 705; 54 Am. Dec. 245.

³ Hartley's Appeal, 33 Pa. St. 212; Smyth v. Craig, 3 W. & S. 14; Walker v. Dennison, 86 Ill. 142; Bonney v. Smith, 17 Ill. 531; Gilbert v. Holmes, 64 Ill. 549; Mansfield v. Mansfield, 6 Conn. 559; Goodman v. Bowden, 54 Me. 424; Hutchins v. Hebbard, 34 N. Y. 24; Hunt v. Rousmaniere, 8 Wheat. 174; Knapp v. Alford, 10 Paige, 205; Beecher v. Bennett, 11 Barb. 380.

⁴ Merry v. Lynch, 68 Me. 94; Bonney v. Smith, 17 Ill. 531; Knapp v. Alvord, 10 Paige, 205; 40 Am. Dec. 241; Gilbert v. Holmes, 64 Ill. 548; Hunt v. Rousmaniere 8 Wheat. 171; Hockett v. Jones, 70 Ind. 237; Leavitt v. Fisher, 4 Duer, 1; Houghtaling v. Marvin, 7 Barb. 412; Wilson v. Stewart, 5 Pa. L. J. 450; Bergin v. Ben-

nett, 1 Caines Cas. 1; 2 Am. Dec. 281; Yates v. Prow, 11 Ark. 58; Cleveland v. Williams, 29 Tex. 304; 94 Am. Dec. 374.

⁵ Story on Agency, § 483.

⁶ Story on Agency, § 483; Esau v. Clark, 3 Pa. St. 224; 44 Am. Dec. 191.

⁷ Matthiessen v. McMahon, 28 N. J. 536.

⁸ 5 O. B. 375.

⁹ Ward v. Lewis, 4 Pick. 521; Watson v. Bageley, 19 Pa. St. 164; 61 Am. Dec. 595; Jones v. Dougherty, 10 Ga. 274; Furman v. Fisher, 4 Cold. 636; 94 Am. Dec. 210; Scull v. Reeves, 3 N. J. Eq. 131; 29 Am. Dec. 703; Levier v. McWhorter, 27 Miss. 442; Hall v. Dennison, 17 Vt. 318; Messonier v. Kauman, 3 Johns. Ch. 3; Ingram v. Kirkpatrick, 6 Ired. Eq. 463; 51 Am. Dec. 423; Walker v. Crowder, 4 Ired. Eq. 485.

agent,¹ an authority to collect and distribute money,² an authority given to an agent to pay to a third party a debt which he owes to his principal, or to sell property and pay himself a debt due to him out of the proceeds, are instances in which an interest has been held to be coupled with the authority so as to make it irrevocable.³

But the cases which illustrate this rule seem to make it clear that we must not understand by such an interest as is here meant the advantage which the agent may derive from a continuance of the authority, or the inconvenience, or even the loss which he may suffer by its revocation.⁴ Therefore the consideration or interest must be something beyond the mere compensation out of the proceeds or for the services to be rendered.⁵ Where an owner of land containing iron ore authorized an agent in writing to sell the land, the agent agreeing to transport specimens of the ore to England and to receive as compensation "an undivided one-fourth in the proceeds of sale when sold as aforesaid:" it was held that the agent's authority was not coupled with an interest and was revocable at any time before sale.⁶

¹ *U. S. v. Jarvis, Daviess*, 274; *Spear v. Gardner*, 16 La. Am. 383; *Marston v. Picole*, 8 Cal. 522.

² *Watson v. Bagaley*, 12 Pa. St. 164; 15 Am. Dec. 596.

³ *Wheeler v. Slocum*, 16 Pick. 52.

⁴ *Wheeler v. Knaggs*, 8 Ohio, 169; *Chambers v. Seary*, 73 Ala. 372; *Hutchins v. Hebbard*, 34 N. Y. 24; *Guthrie v.*

Wabash R. Co., 40 Ill. 100; *Kindig v. March*, 15 Ind. 248.

⁵ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Walker v. Dennison*, 86 Ill. 142; *Simpson v. Carson*, 11 Oregon, 361; *Barr v. Schroeder*, 23 Cal. 609; *Hartley's Appeal*, 53 Pa. St. 312; *Darrow v. St. George*, 8 Col. 592. *Contra*, *Merry v. Lynch*, 68 Md. 94.

⁶ *Chambers v. Seary*, 73 Ala. 372.

CHAPTER VI.

THE CONSENT.

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§ 205. **Consent of Parties Essential.**— To an absolutely binding contract it is essential that there should be consent on the part of both parties to enter into contractual relations, and though it is apparent on the face of the contract that the parties did so consent, as where the words used by them clearly show consent to be present, nevertheless the law will look beyond this for the purpose of discovering whether such apparent consent is a real consent, and if it is found that it is not so will avoid the contract at the suit of the innocent party.

This apparent yet far from real consent may arise from five causes: A. It may arise from **MISTAKE**, as for example where one of the parties did not mean the same thing as the other one, or where one or both, while meaning the same thing, formed untrue conclusions as to the subject-matter of the agreement. B. It may arise from **MISREPRESENTATION**, as for example where one of the parties was led to form untrue conclusions respecting the subject-mat-

ter of the contract by statements innocently made, or facts innocently withheld by the other. C. It may arise from FRAUD, as for example where the untrue conclusions formed by one of the parties were induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving. D. It may arise from DURESS, as for example where the apparent consent of one of the parties was extorted from him by the other by actual or threatened personal violence. Or E, it may arise from UNDUE INFLUENCE, as for example where the relations of the parties were such that one of them was morally incapable of resisting the will of the other. These five subjects, mistake, misrepresentation, fraud, duress and undue influence, will be considered in the next succeeding sections.

A.

MISTAKE.

§ 206. **Introductory.** — The law is well settled that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence or oppression. And under the same circumstances ignorance of some stipulation in the contract is no ground for setting it aside, the mistake of the party being due to his own carelessness or inattention.¹ The law judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them, and the acceptance of an offer without objection or condition binds the party accepting; and the party making the offer has the right to understand that the acceptance was according to the terms of the offer.²

§ 207. **Mistake in Motive or Expectations.** — Where a party is mistaken in his motive for entering into the con-

¹ *Robertson v. Smith*, 11 Tex. 211; 60 Am. Dec. 234.

² *Drew v. Edmonds*, 60 Vt. 401; 6 Am. St. Rep. 122.

tract, or in his expectations respecting it, such mistake does not affect its validity.¹ For example if a person purchase a specific article, believing it will answer a particular purpose to which he intends to put it, and it fails to do so, he is bound just the same to pay for it, according to his agreement.² So where a man being desirous of being a freeholder of Essex contracted to purchase a house which he believed to be in that county, but which proved to be in another, it was held, nevertheless, that he was bound.³

§ 208. **Mistake in Expressing the Agreement.**— A mistake may be made by the parties in expressing their agreement, as where having agreed upon the terms of the contract they put it in writing, but an error is made in reducing the terms to writing. Here the writing is conclusive between them, and the law does not permit one of them to show by parol evidence that the written document does not express his real agreement.⁴ But where the mistake is so obvious on the face of the writing as to leave no doubt of the intention of the parties, and external evidence is unnecessary, here the court will construe it according to the obvious intention, as where it is clear on the face of an instrument that one name has been written for another, the court will read the instrument with the mistake corrected.⁵

§ 209. **Mistake of One Party Caused by the Other.**— If the other party have caused the mistake by misrepresentation, designedly, and for the purpose of inducing the contract, the contract may be avoided at law and in equity.⁶ But this is on the ground of fraud, a subject which is considered in another place.⁷

¹ *Leake*, Cap. 8, § 1. But see *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621.

² *Charter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

³ *Shirley v. Davis*, cited in 6 Ves. 678, 7 Ves. 270.

⁴ See *post*, Parol Evidence.

⁵ *Leake*, Cap. 8, § 1; *Wilson v. Wilson*, 23 L. J. Ch. 697; *Saunderson v. Piper*, 5 Bing. N. C. 425.

⁶ *Lawson Rights*, Rem. & Fr., § 2340; *Phillips v. Hollister*, 2 Cold. 267; *Beebe v. Young*, 14 Mich. 136.

⁷ See *post*, § 226.

§ 210. **Mistakes of Law.** — It is well settled that a mistake, to be a ground of avoiding an agreement, must be a mistake of fact and not a mistake of law.¹ But if two parties enter into a contract under a mistake of law, equity will relieve upon the ground of surprise, and if one of the parties is mistaken as to the law, and the other knowing this contracts with him, equity will relieve upon the ground of fraud.²

§ 211. **Mistake Preventing the Formation of a Contract.** — Nevertheless, where the mistake is of such a nature that there is absence of all consent to the apparent contract, there is no agreement at all, for nothing is more elementary in the law of contracts than the principle that to constitute a contract, the parties must assent to the same thing in the same sense; the minds of both must meet as to the same thing.³ Mistake of this kind goes, not to avoid the contract, but to show that there is no contract at all, and may be of three kinds: (1) concerning the nature of the transaction, (2) concerning the person with whom the contract is made, or (3) concerning the subject-matter of the contract.

§ 212. **Mistake Concerning Nature of Transaction.** — Where a person by mistake enters into a different kind of

¹ *Fisher v. May*, 2 Bibb, 448; 5 Am. Dec. 628; *Storrs v. Barker*, 6 Johns. Oh. 166; 10 Am. Dec. 316; *Hunt v. Rousmanier*, 8 Wheat. 174; 1 Pet. 1; *Pitcher v. Hennessy*, 48 N. Y. 415; *State v. Raigart*, 1 Gill, 1; 39 Am. Dec. 628; *Trigg v. Read*, 5 Humph. 529; 42 Am. Dec. 447; *Farnsworth v. Dinamore*, 2 Swan, 42; *Pierson v. Armstrong*, 1 Iowa, 283; 63 Am. Dec. 441; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406; *Drew v. Clark*, Cooke (Tenn.), 378; 5 Am. Dec. 698; *Good v. Herr*, 7 Watts & S. 263; 42 Am. Dec. 236; *Burkhauser v. Schmitt*, 45 Wis. 316; 30 Am. Rep. 740.

² *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476; *Hardigree v. Mitchum*, 51 Ala. 151; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 616; *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540; *Warden v. Tucker*, 7 Mass. 449; 5 Am. Dec. 62; *Offutt v. Parrish*, 1 Cranch. C. C. 154; *May v. Coffin*, 4 Mass. 347; *Freeman v. Boynton*, 7 Mass. 483; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 383.

³ *Hartford, etc., R. Co. v. Jackson*, 24 Conn. 514; 63 Am. Dec. 177; *People v. Atty-Gen*, 17 Mich. 83; *Saltus v. Pruyn*, 18 How. Pr. 512; *McCotter v. New York*, 37 N. Y. 325.

agreement than that which he intended to make, there is no contract, as for example where he signs a bond which he believes to be only a petition,¹ or which he thought he was simply signing as a witness,² or where he executes a release from "all claims" which he thought was a release of arrears of rent.³ In *McGinn v. Tobey*,⁴ a deed was signed by one who believed it to be the duplicate of a lease of a portion of the premises conveyed, which he had signed after it had been read to and by him, the lessee therein having placed the two documents, which closely resembled each other, together upon the table to be signed, and it having been previously agreed that two copies of the lease should be signed. This was held not the deed of the signer. A leading case on this subject is an English one, *Foster v. McKinnon*,⁵ where the acceptor of a bill of exchange induced the defendant to indorse it, telling him that it was a guaranty. The plaintiff was a subsequent *bona fide* indorsee of the bill, for value. It was held that the defendant's signature did not bind him. The court said: "It is plain on principle and on authority that if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature*; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended." The princi-

¹ Schuylkill Co. v. Copley, 67 Pa. St. 386; 5 Am. Rep. 441.

² Wake v. Harrop, 3 H. & N. 768.

³ Thoroughgood's Case, 2 Coke, 9.

⁴ 62 Mich. 252; 4 Am. St. Rep. 848.

⁵ L. R. 4 C. P. 704.

ple of this case has been followed in many American cases.¹

It will be noticed that in *Foster v. McKinnon*, the absence of negligence was strongly dwelt upon by the court and in the three cases first cited in this section, the defendant was an illiterate man, unable to read. This distinction is important,² as it is well settled that where a party in full possession of his faculties and able to read, signs a negotiable instrument under the belief that it is an instrument of a different character, and does so without himself reading it but relying on the reading or representation of another, he is guilty of such negligence as to estop him from setting up such defense in an action on the note by a *bona fide* holder for value.³ And it may be said generally that a person *sui juris* and able to read cannot, except for fraud, deny his written obligation by showing that when he signed it he had not read it.⁴

§ 213. **Mistake Concerning Person with whom Contract is Made.** — Where A contracts with B, thinking that he is contracting with C, there can obviously be no contract, for B not being present to A's mind A cannot be a consenting party to a contract with B.⁵ Thus in *Cundy v. Lindsay*⁶ A, by imitating the signature of B, induced C & Co. to

¹ *Soper v. Peck*, 51 Mich. 563; *Baldwin v. Bricker*, 86 Ind. 221; *DeCamp v. Hanna*, 29 Ohio St. 467; *Gibbs v. Linabury*, 23 Mich. 479; *Whitney v. Snyder*, 2 Lane, 477; *Oline v. Guthrie*, 42 Ind. 236; *Walker v. Ebert*, 29 Wis. 194; *Detwiller v. Bish*, 44 Ind. 70; *Corby v. Weddie*, 87 Mo. 452; *Piffer v. Smith*, 57 Ill. 527; *First N. B. v. Leerman*, 5 Neb. 247; *Bowers v. Thomas*, 63 Wis. 490.

² *Rockford, etc., Co. v. Shunick*, 65 Ill. 223; *Schaper v. Schaper*, 84 Ill. 608; *Vanbrunt v. Singley*, 85 Ill. 281; *Trambly v. Ricard*, 130 Mass. 259.

³ *Chapman v. Rose*, 56 N. Y. 137; *Lesch v. Nichols*, 53 Ill. 273; *Ross v. Doland*, 29 Ohio St. 473; *Fisher v. Van Behren*, 70 Ind. 19; *Ruddell v. Dillman*,

73 Ind. 518; *Williams v. Stoll*, 79 Ind. 80; *Baldwin v. Barrows*, 86 Ind. 351; *Douglas v. Matting*, 29 Ia. 486; *Ort v. Fowler*, 31 Kan. 478; *Mackey v. Peterson*, 29 Minn. 298; *Gavagan v. Bryant*, 83 Ill. 376; *Upton v. Tribblecock*, 91 U. S. 80.

⁴ *Rothschild v. Frensdorf*, 21 Mo. App. 318; *Hunter v. Walters*, L. R. 7 Ch. 81.

⁵ Such a case can of course only arise where A has in contemplation a definite person with whom he desires to contract: it cannot affect general offers which any one may accept, as, for instance, contracts by advertisement or sales for ready money.

⁶ 3 App. Cas. 455.

supply him with goods under the belief that they were supplying B. It was held that no contract had ever arisen between C & Co. and A. "Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between *him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.*"

So where A intends to contract with B, C cannot make himself a party to the contract by substituting himself for B, for no man can be compelled against his will to accept another contracting party in place of the one he intends to deal with, and it makes no difference that the contract with the other would be equally valuable and its results exactly the same.¹ Thus where A sends an order for goods to B, or makes any other proposal to B, C cannot make himself a party to the contract, without the knowledge of A, by supplying the goods or otherwise accepting the proposal in the place of B. A may have a set-off against B, and in any case he has a right to the benefit he may contemplate from the character, credit, and substance of B.² And, to take another view of the transaction, C is never present to A's mind in the formation of the contract, and so A is no consenting party to a contract made with C.

In *Boulton v. Jones*,³ the plaintiff succeeded to the business of one Brocklehurst, with whom the defendant had been accustomed to deal. The defendant sent an order for goods to Brocklehurst, and the plaintiff supplied the goods without any notification of the change. It was held that he could not recover their price because: "In order to entitle the plaintiff to recover he must show that there was

¹ *Gregory v. Wendell*, 40 Mich. 443; *Holtz v. Schmidt*, 59 N. Y. 253; *Hamet v. Letcher*, 57 Ohio St. 356; *Winchester v. Howard*, 97 Mass. 304.

² *Boulton v. Jones*, *post*; *Boston Ice Co. v. Potter*, *post*; *Randolph Iron Co. v. Elliott*, 34 N. J. (L.) 184.

³ 2 H. & N. 564.

a contract with himself." In *Boston Ice Co. v. Potter*,¹ P, who had bought ice for his house from the Boston Ice Company, ceased to take it of them on account of some dissatisfaction, and contracted for ice with the Citizens' Ice Company. Subsequently the former bought out the business of the latter company and continued to deliver ice to P without notifying him of the change until after the consumption of the ice so delivered. It was held that the Boston Ice Company could not recover from P the price of the ice. "A party," said Endicott, J., "has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has as in this case, reasons why he does not wish to deal with a particular party. In all these cases as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant before receiving the ice or during its delivery had received notice of the change, and that the Citizen's Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do because the plaintiff failed to inform him of that which he had a right to know. If he had received notice and continued to take the ice as delivered a contract would be implied."

§ 214. **Mistake Concerning Subject-Matter of Contract.**—Mistake as to the subject-matter of the contract may relate (a) to its existence or (b) to its identity.

(a) If the parties make an agreement in regard to a thing which, unknown to both parties, is non-existent at the time

¹ 123 Mass. 28.

of entering into the contract, the mistake goes to the root of the matter and avoids the contract, for there can be no contract where there is no subject-matter.¹ As the thing agreed upon has ceased to be possible before the agreement was made, such impossibility prevents a contract from ever having arisen and does not operate, as impossibility arising subsequent to the contract will sometimes operate, as a form of discharge.² Thus, where A agrees to sell to B a certain horse which, unknown to the parties, is dead, or a certain building which is burned down, at the time of their making the agreement, there is no binding contract.³ So, where the plaintiff purchased an annuity which at the time of purchase had already failed owing to the death of the annuitant, it was held that he could recover the price which he had paid for the annuity.⁴ So where a sale was made of a cargo of corn which was supposed by the parties to be at the time on its voyage from a foreign port to England, but which had in fact prior to that time become so heated that it had to be unloaded and sold, it was held that there was no contract, because the object of the sale was not in existence.⁵

But where there is an absolute unconditional contract not showing any intention that the existence of the thing was an implied condition, here the promisor will be bound at all events. Thus where the vendor covenanted that he had power to sell and assign a certain shop to the vendee, it was held that the covenant was absolute and not conditional, and that it was broken if the shop had ceased to exist at the time of the sale though both parties were ignorant of it.⁶ So where the parties treat upon the

¹ *Allen v. Hammond*, 11 Pet. 63; *Thompson v. Gould*, 20 Pick. 134; *Brick Co. v. Pond*, 38 Ohio St. 65; *King v. Doolittle*, 38 Tenn. 77; *Gibson v. Pelkie*, 37 Mich. 380; *Silvernail v. Coole*, 13 Barb. 685.

² See *post*, Performance.

³ *Bradford v. Chicago*, 25 Ill. 423;

Allen v. Hammond, 11 Pet. 71; *Thompson v. Gould*, 20 Pick. 133; *Gibson v. Pelkie*, 37 Mich. 380; *Anderson v. Armistead*, 69 Ill. 452.

⁴ *Strickland v. Turner*, 7 Ex. 217.

⁵ *Centurion v. Hastie*, 5 H. L. Cas. 673; and see *Clifford v. Watts*, L. R. 5 C. P. 577.

⁶ *Barr v. Gibson*, 3 M. & W. 390.

basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration, the contract will be valid, notwithstanding any mistake on their part.¹ Thus, where a person agreed to sell and deliver certain goods on the arrival of a certain ship and on its arrival the goods were not on board as was expected, it was held that he was nevertheless responsible for the non-delivery. In *Hills v. Sughrue*,² the defendant agreed with the plaintiff by charter-party to take his (the defendant's) ship to the island of Ichaboe and there load a complete cargo of guano and return with it to England, being paid a high rate of freight. There was so little guano at Ichaboe that the performance of the defendant's promise to load a complete cargo was impossible. The plaintiff sued him for damages for failure to bring home a cargo, and was held to be entitled to recover. What amount of guano was on the island was clearly doubtful and the defendant took the risk of it.

(b) Where A agrees with B concerning one thing, thinking that B is referring to that, while B agrees with A concerning another thing and thinks that A refers to that other thing, there is no contract, for there is a mistake in the identity of the thing contracted for; the minds of the parties never really meet and there is no true consent.³ Thus, where A agreed to purchase from B a lot on Prospect street and there were two streets of that name in the town, and A meant a lot on one of these streets and B a lot on the other, it was held that there was no agreement.⁴ So where a seller asked \$165 and the buyer understood him to say \$65, it was held that this was no contract though the article had been delivered under the mutual mistake.⁵ In another case A agreed to buy of B a cargo of cotton "to

¹ *Perkins v. Gay*, 3 S. & R. 337; 7 Am. Dec. 653.

² 15 M. & W. 253; and see *Bute v. Thompson*, 13 M. & W. 487.

³ *Harvey v. Harris*, 112 Mass. 32;

Rupley v. Daggett, 74 Ill. 351; *Cutte v. Guild*, 57 N. Y. 229.

⁴ *Kyle v. Kavanagh*, 103 Mass. 356.

⁵ *Rupley v. Daggett*, 74 Ill. 351.

arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one and the seller the other, it was held that there was no contract, and that the buyer was not bound to accept a cargo which, though it came "ex Peerless from Bombay," did not come in the vessel of that name which was present to his mind when he made the agreement.¹ It is clear, as Mr. Anson points out,² that if the buyer had meant a ship of a *different* name he would be bound by the terms of his contract; for unless the description of the subject-matter of the contract admits of more meanings than one, the party setting up mistake can only do so by showing that he meant something other than that which he said; and this, he may not do, and a mere misnomer of the subject of the contract will not entitle either party to avoid it if the contract itself contains such a description of its subject-matter as practically identifies it.³ In a very recent case the defendant sold to plaintiff a blooded cow for the sum of \$80, both parties to the contract supposing the cow was barren. Before the time for delivery arrived defendant discovered that the cow was with calf, whereupon he rescinded the sale and declined to deliver. As a breeder the cow was worth from \$750 to \$1,000. The court held that the right of rescission was properly exercised; that the mistake or misapprehension of the parties went to the whole substance of the agreement. One judge dissented on the ground that the mistake was as to the quality of the thing sold.⁴

§ 215. **Remedy of Party at Law.** — The law offers two remedies to a person who has entered into an agreement void on the ground of mistake. If it be still executory he may repudiate it and successfully defend an action brought upon it; or if he has paid money under the contract, he

¹ *Raffles v. Wichelhaus*, 2 H. & O. 906.

² *Contr.* 120.

³ *Ionides v. Pacific Ins. Co.*, L. R. 6 Q.

B. 368; *Hazard v. New Eng. Ins. Co.*, 1 Sumn. 218.

⁴ *Sherwood v. Walker*, 33 N. W. Rep. 919.

may recover it back upon the general principle that "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back."¹

§ 216. **Remedy of Party In Equity.**—Where the parties have made a mistake in drafting their contract a court of equity will correct the writing in accordance with the manifest intention of the parties,² as for example where by the mistake of a surveyor a larger amount of land was contracted for than there was in reality;³ where a mortgage showed upon its face that by the draftsman's mistake the word "quarterly" was used instead of the word "annually";⁴ or where a material mistake is made in the quantity of land conveyed.⁵ But this relief is not given where the mistake is not as to the contents of the instrument, but as to its legal effect;⁶ nor where neither fraud, mistake, nor surprise is proved, and the deed is such as the parties designed it to be;⁷ nor where the deed is voluntary;⁸ nor where it

¹ See *ante*, § 53.

² *Pomeroy's Eq. Jur.*, § 845; *De Jarnett v. Cooper*, 59 Cal. 703; *Elliot v. Sockett*, 108 U. S. 132; *Aldridge v. Weems*, 2 Gill & J. 36; 19 Am. Dec. 250; *Newcomer v. Kline*, 11 Gill & J. 457; 37 Am. Dec. 74; *Willis v. Henderson*, 4 Scam. 13; 38 Am. Dec. 120; *Mosby v. Wall*, 23 Miss. 81; 55 Am. Dec. 71; *Leitensdorfer v. Delphy*, 15 Mo. 180; 55 Am. Dec. 137; *Greer v. Caldwell*, 14 Ga. 207; 58 Am. Dec. 553; *Dunham v. Chatham*, 21 Tex. 231; 78 Am. Dec. 223; *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52; *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 323; *Nat. Fire Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 239; *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232; *Kilmer v. Smith*, 77 N. Y. 226; 33 Am. Rep. 613; *Turner v. Shaw*, 9 Am. St. Rep. 319; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193.

³ *Jenks v. Fritz*, 7 Watts & S. 201;

42 Am. Dec. 227; *Gilmore v. Morgan*, 2 J. J. Marsh. 65.

⁴ *Fowler v. Woodward*, 25 Minn. 347.

⁵ *Ladd v. Pleasants*, 29 Tex. 415; *Paine v. Upton*, 87 N. Y. 337; 41 Am. Rep. 371. For further illustrative cases see *Lawson Rights, Rem. & Pr.*, § 3306.

⁶ *Toops v. Snyder*, 70 Ind. 554; *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333; *Pierson v. Armstrong*, 1 Iowa, 232; 63 Am. Dec. 440; *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; *Burt v. Wilson*, 23 Cal. 632; 37 Am. Dec. 142; *Martin v. Hamlin*, 18 Mich. 354; 100 Am. Dec. 181.

⁷ *McElderry v. Shipley*, 2 Md. 25; 56 Am. Dec. 703; *Bradford v. Bradford*, 54 N. H. 463; *Story v. Conger*, 26 N. Y. 673; 93 Am. Dec. 546.

⁸ *Eaton v. Eaton*, 15 Wis. 259; *Petesach v. Hambach*, 48 Wis. 443; *Powell v. Powell*, 27 Ga. 36; 73 Am. Dec. 724.

is illegal, or relates to an illegal matter;¹ nor where the mistake was not mutual;² nor where the mistake arose from negligence;³ nor where the complaining party has been guilty of laches.⁴

And equity has a jurisdiction in cases of mistake as in cases of fraud to order the contract to be delivered up or destroyed.⁵

B.

MISREPRESENTATION.

§ 217. In What Cases Misrepresentation Avoids Contract.—Misrepresentation in order to affect the formation or the discharge of a contract, must either be made (a) with a *fraudulent motive*, or (b) must occur in the case of *certain special contracts*, or must be (c) *a term or integral part of the contract*. And it must be borne in mind that in case (c), that is if the representation forms a term or an integral part of the contract, it is the same thing as a promise, and if it turns out to be false, the untruth does not affect the formation of the contract, but discharges the injured party from his liabilities, or gives him a right of action for the breach of such promise. But as we are dealing here with cases in which the contract has not been effectually formed, and not with cases in which it has been formed and broken, this latter case (c) will be considered in another place.⁶

(a) Misrepresentation made with a fraudulent motive is a fraud and will be treated in the next sections. The distinction between misrepresentation and fraud is that the former is an *innocent misstatement* or *non-disclosure of fact*, while the latter consists in *representations known to be false*, or made in such *reckless ignorance of their truth* or

¹ Henkle v. Ins. Co., 1 Ves. Sr. 317;
Petesch v. Hambach, 48 Wis. 443.

² De Jarnatt v. Cooper, 59 Cal. 703.

³ Brown v. Fagan, 71 Mo. 563; Toops
v. Snyder, 70 Ind. 554.

⁴ Sable v. Maloney, 48 Wis. 331.

⁵ See *post*, § 250.

⁶ See *post*, BREACH OF CONTRACT.

falsehood as to entitle the injured party to the action of deceit.¹

(b) As to naked misrepresentation, i. e., innocent misrepresentation or non-disclosure of fact, it will be found that unless it occurs in certain special kinds of contracts to be presently described it does not affect the validity of the consent. In the leading case of *Behn v. Burness*,² the court say: "Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) *is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue.* * * * Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court and not the jury must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement,

¹ Anson Contr. 139.

² 1 B. & S. 877; 3 Id. 751.

a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages”¹

§ 218. **Contracts Affected by Misrepresentation.**— The special contracts which are affected in their formation by misrepresentation or non-disclosure, are contracts *uberrimæ fidei*, i. e., those in which one of the parties must, from the nature of the contract, *rely upon statements* made by the other, and is placed at a disadvantage as regards his means of acquiring knowledge upon the subject. In the English courts three classes of cases fall under this head, viz.: (a) contracts of insurance; (b) contracts for the purchase of shares in corporations; (c) contracts for the sale of land, and a fourth class is sustained by both American and English courts, viz.: (d) where the parties stand towards one another in certain fiduciary relations.

§ 219. **Contracts of Insurance.**— (a) In the contract of marine insurance, according to the English courts, the insured is bound to give to the underwriter all such information as would be likely to determine his judgment in accepting the risk; and misrepresentation or concealment of any such matter, though unaccompanied by fraudulent intention, avoids the policy. “It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.”² The same doctrine prevails in the courts of the United States. In *McLanahan v. Universal Ins. Co.*,³ the Supreme Court of the United States say: “The contract of insurance is one of mutual good faith; and the principles which govern it are those of enlightened moral policy. The underwriter must be pre-

¹ See *post*, Conditions and Warranties.

² *Ionides v. Pender*, L. R. 9 Q. B. 537.

³ 1 Pet. 170.

sumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any fact material to the risk, which he does not disclose." Every fact is material which, if communicated to the underwriter, would have the effect to influence his action in declining or accepting the risk; and concealment, though only the effect of accident, negligence, inadvertence or mistake, will, if material, avoid the policy.¹ Thus it has been held that the insured was bound to communicate to the insurer that, a few hours after the sailing of the vessel, a violent storm had occurred at her port of departure;² that she had been so long on the voyage as to raise a presumption of an accident or casualty;³ that the vessel at the time was actually lost;⁴ or that the vessel carried belligerent goods, or goods contraband of war.⁵

In the contract of fire insurance the same rule exists both in England⁶ and America,⁷ and a false representation of a material fact, however innocently made, avoids the policy.⁸ But as the universal practice now is to make applications for insurance by way of answers to specific written inquiries, it is held, under such an application, that innocent failure to communicate, or innocent non-disclosure of facts about

¹ *Walden v. Ins. Co.*, 12 La. 134; 33 Am. Dec. 116; *Murgatroyd v. Crawford*, 3 Dall. 491; *Livingston v. Delafield*, 1 Johns. 523; *Vale v. Ins. Co.*, 1 Wash. 283; *Livingston v. Ins. Co.*, 6 Cranch. 274; *Biays v. Union Ins. Co.*, 1 Wash. 506; *Oliver v. Greene*, 3 Mass. 133; 3 Am. Dec. 96; *Stocker v. Ins. Co.*, 6 Mass. 320; *Fiske v. Ins. Co.*, 15 Pick. 310; *Burritt v. Saratoga Ins. Co.*, 5 Hill, 189; 40 Am. Dec. 345; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276; *Ingraham v. S. C. Ins. Co.*, 2 Tread. Const. 707; *Price v. DePeau*, 1 Brev. 452; 2 Am. Dec. 680. And see *Union Ins. Co. v. Storey*, Harp. 235; *Lexington Ins. Co. v. Paver*, 16 Ohio, 334; *Buggles v. Gen. Mut. Ins. Co.*, 4 Mason, 74; 13 Wheat. 409.

² *Ely v. Hallett*, 2 Caines, 57; *Moses*

v. Delaware Ins. Co., 1 Wash. C. C. 387.

³ 2 Duer on Insurance, 468; *Westbury v. Aberdeen*, 2 Mees. & W. 267; *Elkin v. Jansen*, 13 Mees. & W. 655; *Richards v. Murdock*, 10 Barn. & C. 527; *Graham v. Ins. Co.*, 6 La. Ann. 482.

⁴ *Ins. Co. v. Lyman*, 15 Wall. 664.

⁵ *Lawson Rights, Rem. & Fr.*, § 2165.

⁶ *Anson Contr.* 149.

⁷ *Daniels v. Ins. Co.*, 13 Cush. 416; 59 Am. Dec. 192; *Campbell v. Ins. Co.*, 93 Mass. 381; *Hartford Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Bobblitt v. Ins. Co.*, 66 N. O. 70; 8 Am. Rep. 494; *North Am. Ins. Co. v. Throop*, 22 Mich. 146; 7 Am. Rep. 638; *Pinkham v. Morang*, 40 Me. 587.

⁸ *Armour v. Trans-Atlantic Ins. Co.*, 90 N. Y. 450.

which the plaintiff was not asked, will not have the effect to avoid the policy of insurance.¹ And there can be no concealment of a fact which is not known to the insured;² and which is not known to be material to the insurance.³

In the contract of life insurance the English courts distinguish between it and contracts of marine and fire insurance, holding that untruth in the representations made to the insurer as to the life insured will not affect the validity of the contract unless they be made fraudulently, or unless their truth be made an express condition of the contract.⁴ But the American rule is that an untrue allegation or concealment of a material fact "will avoid the policy, though such allegation or concealment be the result of accident, negligence or design."⁵

§ 220. *Contracts for Purchase of Stock in Corporations.*—(b) The English courts require that persons issuing a prospectus of a corporation inviting others to take shares in it on the faith of the representations therein contained, shall state everything with strict and scrupulous accuracy, and not only abstain from stating as a fact that which is not so, but omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares,⁶ the Lord Chancellor in one case saying that mere non-disclosure can never amount to fraud unless accompanied with such substantial representations as give a false air

¹ *Burritt v. Ins. Co.*, 5 Hill, 188; 40 Am. Dec. 245; *Washington Mills Manuf. Co. v. Weymouth Ins. Co.*, 135 Mass. 505; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 186; *Clark v. Manuf. Ins. Co.*, 8 How. 249; *Green v. Merchants' Ins. Co.*, 10 Pick. 402; *Browning v. Home Ins. Co.*, 71 N. Y. 548; *Dennison v. Ins. Co.*, 20 Me. 125; 37 Am. Dec. 42.

² *Hall v. Ins. Co.*, 6 Gray, 185; *Beebe v. Ins. Co.*, 25 Conn. 51; 65 Am. Dec. 553.

³ *May on Insurance*, § 202; *Wise v.*

Ins. Co., 34 Md. 532; *Dennison v. Ins. Co.*, *supra*.

⁴ *Wheulton v. Hardisty*, 8 El. & Bl. 232.

⁵ *Vogle v. Eagle Ins. Co.*, 6 Cush. 42; *Campbell v. Ins. Co.*, 98 Mass. 391; *Goucher v. Ins. Co.*, 20 Fed. Rep. 596; *Bliss on Life Ins.*, 75; *Hartwell v. Ins. Co.*, 33 La. Ann. 1353; 39 Am. Rep. 294.

⁶ *New Brunswick, etc., R. Co. v. Muggeridge*, 1 Dr. & Sm. 381; *Venezuela R. C. Co. v. Kisch*, L. R. 2 H. L. 113.

to facts, but that "it might be ground in a proper proceeding and at a proper time for *setting aside an allotment or purchase of shares*." ¹ Following this, Mr. Anson ² includes contracts for the purchase of shares in companies as one of the special contracts which misrepresentation will avoid. But it is not believed that the American adjudications require in such contracts any greater degree of good faith than is exacted of parties in regard to other contracts; nor would such contracts be avoided unless the representations were made with the fraudulent intention of inducing other persons relying on them to act. ³

§ 221. **Contracts for Sale of Land.** — (c) In England it is held that a mis-description of the premises sold or of the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract. ⁴ But in the United States the subject-matter of the contract for the sale of land does not require any greater degree of good faith on the part of the vendor than is required on the sale of any other class of property. "The rule excusing parties from making disclosures in sales of personalty applies equally in sales of real estate." ⁵

§ 222. **Contracts between Parties in Fiduciary Relations.** — (d) The utmost good faith is required where the contracting parties sustain confidential relations to each other. Full disclosure of material facts is required in contracts between agent and principal, attorney and client, trustee and beneficiary, and the like, where special confidence is reposed. ⁶

¹ *Peek v. Gurney*, L. R. 6 H. L. 408.

² *Contr.* 151.

³ *Pom. Eq. Jur.*, § 881.

⁴ *Anson Contr.* 150; *Flight v. Booth*,

1 *Bing. N. C.* 370; *Jones v. Edney*, 3 *Camp.* 285.

⁵ *Bigelow on Fraud*, 33; *Williams v. Spur*, 24 *Mich.* 335.

⁶ *Brooks v. Martin*, 2 *Wall.* 84; *Baker v. Humphrey*, 101 *U. S.* 502; *Casey v. Casey*, 14 *Ill.* 112; *Norris v. Taylor*, 49 *Ill.* 17; *Zeigler v. Hughes*, 55 *Ill.* 288; *Ward v. Armstrong*, 84 *Ill.* 151; *Reed v. Peterson*, 91 *Ill.* 238. See *post*, **FRAUD** and **UNDUE INFLUENCE**.

§ 223. **Expressions of Opinion.** — Even in the contracts just mentioned, a representation of opinion, though erroneous, will not invalidate them.¹ In the contract of marine insurance the opinion of the master of the ship that the anchorage of the place to which the vessel was bound was safe and good was held not to affect the case;² or a statement that “said vessel will sail from A in the course of this month;”³ or a statement that the vessel would obtain a cargo of a certain value;⁴ or a statement, “We have no doubt that we could get the insurance effected in New York at that premium.”⁵ So in the contract of fire insurance where the insured, in answer to a question as to the locality of neighboring buildings, truthfully described certain sheds but added that they “would not endanger the buildings if they should burn,” this addition was held but matter of opinion, and not to amount to a misrepresentation.⁶ And in the contract of life insurance a statement as to the extent of interest of the applicant in the life of the assured is a mere matter of opinion, and not a misrepresentation unless knowingly untrue.⁷ In contracts for the sale of land expressions of opinion by a vendor, relative to the title, the quantity, or the value, etc., if they do not amount to a misstatement of matters of fact, will not, although the opinion is erroneous or ill founded, entitle the purchaser to relief on the ground of fraud.⁸

§ 224. **Commendatory Expressions — Puffing.** — Commendatory expressions, such as men habitually use in order to induce others to enter into a bargain, are not dealt with

¹ *Lawson Rights, Rem. & Pr.*, § 2345; *McClellan v. Scott*, 24 Wis. 81; *Bryant v. Ocean Ins. Co.*, 22 Pick. 200.

² *Anderson v. Pac. Ins. Co.*, L. R. 7 C. P. 65.

³ *Allegre v. Maryland Ins. Co.*, 2 Gill & J. 136; 20 Am. Dec. 424; *Rice v. Ins. Co.*, 4 Pick. 439; *Curell v. Ins. Co.*, 9 La. 163; 29 Am. Dec. 439.

⁴ *Fosdick v. Ins. Co.*, 3 Day, 108.

⁵ *Olason v. Smith*, 3 Wash. C. O. 157.

⁶ *Dennison v. Ins. Co.*, 20 Me. 125; 37 Am. Dec. 42.

⁷ *Conn. Mut. Ins. Co. v. Lucks*, 108 U. S. 508.

⁸ *Curry v. Keyser*, 30 Ind. 214; *Drake v. Latham*, 50 Ill. 270.

as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser.¹

§ 225. **Statements of Intention.** — A statement of intention or expectation, like a statement of opinion, is not a misrepresentation.² A statement in an application for an insurance on a house, that the house is unoccupied, but is to be occupied by a tenant, is not a warranty either that the house will remain occupied or that it will be occupied by a tenant.³ So a policy is not avoided by the fact that a quantity of rags was in the premises insured at the time of the fire, where the applicant represented that no rags were kept in or near the premises, it not appearing that the representation was untrue when made.⁴

C.

FRAUD.

§ 226. **Introductory — Fraud Defined.** — Fraud is a false representation of fact, made by the party who is charged with it, with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it, to his damage. From this definition, it is necessary in order to constitute fraud that the following constituent elements shall be present, viz.: (a) A false *representation*. (b) A representation of *fact*. (c) A representation made by the *party charged*. (d) *Knowledge* of its falsehood or a reckless indifference in the matter. (e) An intention that it

¹ Tiedeman on Sales, § 166.

² Southern Development Co. v. Silva, 125 U. S. 247; Gordon v. Butler, 105 U. S. 553; Sawyer v. Prickett, 19 Wall. 146; Ellis v. Andrews, 56 N. Y. 83; Chrysler v. Canaday, 90 N. Y. 272; Gordon v. Parmlee, 2 Allen, 212; Mooney v. Miller, 102 Mass. 217; Warren

v. Doolittle, 61 Ill. 171; Tuck v. Downing, 76 Ill. 71.

³ Hughes v. Ins. Co., 27 Conn. 10; O'Neil v. Ins. Co., 8 N. Y. 122; Herrick v. Ins. Co., 48 Me. 558; 77 Am. Dec. 244; Catlin v. Ins. Co., 1 Sum. 434; Hough v. Ins. Co., 29 Conn. 10; 76 Am. Dec. 581.

⁴ Gould v. York, etc., Ins. Co., 47 Me. 408; 74 Am. Dec. 436.

shall be acted upon by the other party. (f) A reliance upon it by the other party. (g) Damage to the party deceived.

(a) *False Representation.*

§ 227. **False Representation Essential — Non-Disclosure.**— Mere non-disclosure does not amount to fraud, where there is no duty on the party to make the disclosure.¹ But the active concealment of a material fact has the same effect as an express false representation.² By an active concealment is meant a representation true as far as it goes, but accompanied with such a suppression of facts as makes it convey a misleading impression, for in this case the non-disclosure has the effect of impliedly representing that the fact concealed does not exist, or of rendering the facts disclosed absolutely false.³ So where the party attempts to draw the other's attention from the fact or to cover it from view, the silence becomes equivalent to a false representation and is a fraud.⁴

§ 228. **Party Relying on Other to Give Information.**— Where one party knows that the other relies on him to tell him fully as to the facts of the case, a duty arises on the part of the former to conceal nothing material to the bargain.⁵ So where the parties stand in fiduciary relations to each other, a purchaser is bound to communicate to the vendor all information in his possession which it is material for him to know in order to enable him to judge of the value of the property.⁶ Thus while there is no implied war-

¹ *Juzan v. Toulmin*, 9 Ala. 602; 44 Am. Dec. 448; *Kohl v. Lindley*, 29 Ill. 185; 89 Am. Dec. 294; *Graffenstein v. Eppstein*, 23 Kan. 444; 83 Am. Rep. 171; *Mills v. Lee*, 6 T. B. Mon. 91; 17 Am. Dec. 118.

² *Beard v. Campbell*, 3 A. K. Marsh, 125; 12 Am. Dec. 362; *Morris v. Budlong*, 16 Hun, 570; *Hanks v. McKee*, 2 Litt. 287; 18 Am. Dec. 265.

³ *Beard v. Campbell*, *supra*; *Page v. Parker*, 43 N. H. 863; 80 Am. Dec. 172;

Baker v. Seahron, 1 Swan, 54; 55 Am. Dec. 724.

⁴ *Tiedeman on Sales*, citing *Matthews v. Bliss*, 22 Pick. 48; *Smith v. Countryman*, 30 N. Y. 655; *Roseman v. Conovan*, 43 Cal. 118; *Jackson v. Collins*, 39 Mich. 557; *Savage v. Stevens*, 126 Mass. 207.

⁵ See *ante*, MISREPRESENTATION; and *post*, UNDUE INFLUENCE.

⁶ See *ante*, MISREPRESENTATION; and *post*, UNDUE INFLUENCE; *Lawson Rights, Rem. & Pr.*, § 2250.

ranty that premises leased are fit for habitation, yet if a landlord lets premises, having upon them a nuisance prejudicial to life or health, it is his duty to inform the tenant of the existence of the nuisance, and if he fails to do so, an action for damages may be maintained against him,¹ or the tenant may refuse to be bound by the lease, abandon the premises and successfully resist an action for the rent.² If an employer knows, when he accepts a bond given to secure the faithful performance of the duties of an agent, that the agent is a defaulter, and conceals the fact from the sureties, it is a fraud upon them, and discharges them from liability.³ So a promise to marry is voidable on the part of the man where he afterwards discovers that the woman was loose and immoral in her character,⁴ or she concealed from him the fact that she had previously had a bastard child.⁵

§ 229. **Carriers of Goods — Concealment of Value or Quality.** — The carrier of goods has a right to know the value of the goods, so that he may know what risk he takes on himself, what care he should exercise, and what charge he should make. The owner is not bound to state the value unless he is asked to do so,⁶ but if he is asked the value, he must answer truly.⁷ Neither must the owner mislead the

¹ *Cesar v. Karutz*, 60 N. Y. 239; *Wallace v. Lent*, 1 Daly, 481; *Minor v. Sharon*, 112 Mass. 477; *Lucas v. Caulter*, 104 Ind. 81; *Fisher v. Lighthall*, 4 Mackey (D. C.), 82; 54 Am. Rep. 258.

² *Maywood v. Logan*, 78 Mich. 135; 18 Am. St. Rep. 431.

³ *Guardian Ins. Co. v. Thompson*, 68 Cal. 208. See *Roberts v. Denman*, 70 Cal. 108; *Conn. Mut. Ins. Co. v. Scott*, 81 Ky. 540.

⁴ *Butler v. Eischelman*, 18 Ill. 44; *Palmer v. Andrews*, 7 Wend. 143; *Berry v. Bakeman*, 44 Me. 164; *Bell v. Eaton*, 28 Ind. 468; 92 Am. Dec. 329; *Goodall v. Thurman*, 1 Head, 209; *Capehart v. Carradine*, 4 Stro. 42. But *alter* where he knew of her lewd character when he

made the promise. *Kelly v. Highfield*, 15 Or. 277.

⁵ *Bell v. Eaton*, 28 Ind. 468; 92 Am. Dec. 329.

⁶ *R. R. Co. v. Fraloff*, 100 U. S. 24; *Merchant's Despatch Co. v. Bolles*, 80 Ill. 473; *Gulf, etc., R. Co. v. Clark*, 18 A. & E. R. R. Cases, 628; *Brooke v. Pickwick*, 4 Bing. 218; *Southern Express Co. v. Crook*, 44 Ala. 468; *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67; *Belf v. Rapp*, 3 W. & S. 21.

⁷ *Camden, etc., R. Co. v. Baldauf*, *supra*; *Phillips v. Earle*, 8 Pick. 182; *Boskowitz v. Adams Express Co.*, 5 Cent. L. J. 58 (1877).

carrier by making him underestimatethe value of the goods, even though no questions are asked ; as by sending a large sum of money concealed in a bag of hay,¹ or placed in a box with articles of small value;² or by sending a diamond ring in a small paper box tied with a string;³ or by sending valuable jewelry under any circumstances which would naturally lead the carrier to suppose it to be of but trifling value ;⁴ or by wrapping up wearing apparel in a bundle of bedding ;⁵ or by representing that boxes contain household goods when they contain clothing and jewelry;⁶ and if he does thus mislead the carrier, and the goods are afterwards stolen or lost, the carrier is not liable.⁷

In all cases of this kind the owner is held to be guilty of constructive fraud, although, in point of fact, no fraud was intended.⁸ In further illustration of this important rule requiring fair dealing on the part of the owner, it may be mentioned that if one sends glass articles in a box without informing the carrier of the nature of the articles, and they are broken ;⁹ or sends a trunk labeled as containing articles of a different and smaller value than those really contained therein, and they are stolen ;¹⁰ or sends a check indorsed in blank in a letter without informing the carrier of the contents of the letter, and the letter is stolen ;¹¹ or sends money in a package, knowing that by the rules of the carrier money

¹ *Gibbon v. Paynton*, 4 Burr. 2298.

² *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578; *Magnin v. Dinmore*, 62 N. Y. 35; *Earnest v. Express Co.*, 1 Woods, 573; *Belger v. Dinmore*, 51 N. Y. 166.

³ *Everett v. Southern Express Co.*, 46 Ga. 303; *Steat v. Fagg*, 5 Barn. & Ald. 342.

⁴ *Oppenheimer v. United States Express Co.*, 69 Ill. 62.

⁵ *Savannah, etc., R. Co. v. Collins*, 77 Ga. 376.

⁶ *Charleston, etc., R. Co. v. Moore*, 5 S. E. Rep. 769.

⁷ *Tyly v. Morrice*, 3 Carth. 485; *Titchburne v. White*, 1 Strange, 145; *Earnest v. Express Co.*, 1 Woods, 579; *Coxe*

v. Heasley, 19 Pa. St. 243; *Hollister v. Nowlen*, 19 Wend. 234; *Everett v. Southern Express Co.*, 46 Ga. 303; *Cincinnati, etc., R. Co. v. Marcus*, 28 Ill. 219; *Hellman v. Holladay*, 1 Woolw. 366; *Kenrig v. Eggeston*, Aleyn, 93; *Orange County Bank v. Brown*, 9 Wend. 85.

⁸ *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578; *Cooper v. Berry*, 21 Ga. 526; *Great Northern R. Co. v. Shepherd*, 14 Eng. Law & Eq. Rep. 367.

⁹ *American Express Co. v. Perkins*, 42 Ill. 458.

¹⁰ *Relf v. Rapp*, *supra*; *Hollister v. Nowlen*, *supra*.

¹¹ *Hayes v. Wells*, 23 Cal. 135.

packages are required to be put up, indorsed and sealed in a particular way, which requirement is disregarded, and the money is stolen, the carrier will not be liable.¹

Other frauds may be committed by the owner on the carrier which will prevent a recovery by the former — as where he obtains from one of several proprietors of a coach an agreement to carry himself, his family, and his goods on a consideration from which the other proprietors are to derive no benefit. Such an agreement is a fraud as to them, is not binding on them, and will not support an action against them.² So where the owner made a secret agreement with part of the owners of a vessel, in fraud of the others, the latter were held not liable.³ One traveling upon a non-transferable free pass issued to another person and passing himself as such person, is guilty of such fraud as to prevent a recovery for such injury, unless the negligence was so gross as to amount to a willful injury.⁴

§ 230. **Non-Disclosure by Vendor.**—The silence of a seller of an article when the buyer is exaggerating the value or quality of the goods is not a fraud nor is the seller obliged to point out defects in them (*i. e.*, patent defects) if they can be discovered by the buyer by the exercise of reasonable diligence; for the rule in the case of sales is *caveat emptor*.⁵ But if the seller does anything to prevent the discovery he is guilty of a fraud.⁶ Thus where a person, in order to sell a log of mahogany, turned it so as to conceal

¹ *St. John v. Express Co.*, 1 Woods, 612.

² *Bignold v. Waterhouse*, 1 Mau. & Sel. 255; *Jones v. Sims*, 9 Port. 236.

³ *Jones v. Sims*, 9 Port. 236; 33 Am. Dec. 313.

⁴ *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613.

⁵ *Hart v. Holcombe*, 32 N. H. 185; *Tessey v. Dalton*, 3 Allen, 380; *Lytie v. Bird*, 3 Jones, 222; *Port v. Williams*, 6 Ind. 219; *Warner v. Daniels*, 1 Wood &

M. 90; *Tuthill v. Babcock*, 2 Wood & M. 298; *Hough v. Richardson*, 3 Story, 659; *Brown v. Leach*, 107 Mass. 364; *Stephens v. Orman*, 10 Fla. 9; *Rocchi v. Schwabacher*, 33 La. An. 1364; *Brown v. Castles*, 11 Cush. 350; *Dickinson v. Lee*, 102 Mass. 559; *Horne v. Perkins*, 124 Mass. 81.

⁶ *Paddock v. Strobbridge*, 29 Vt. 470; *Maynard v. Maynard*, 49 Vt. 297; *Beninger v. Corwin*, 24 N. J. (L.) 268; *Oroyle v. Moses*, 90 Pa. St. 250.

a hole in the underneath side, it was held a fraud on the buyer.¹ In *Smith v. Click*,² defendant in payment of a horse, delivered bank bills to the plaintiff, which were known to the defendant to be worthless at the time, and unknown to the plaintiff, with an agreement that if the notes were not returned in a given time, the defendant should not be bound to receive them. It was held, that it was a fraud, and that the plaintiff had a right to recover the value of the horse, though he did not return the notes within the time limited.

Where one expressly sells "with all faults," it is no fraud for him to conceal any defects in the article even though he knows of them.³ But the rule is different when the seller by positive means prevents the buyer from detecting the defects.⁴ Thus in one case where a person sold a vessel with all faults, and, before the sale, had taken her from the ways on which she lay and placed her afloat in a dock for the purpose of preventing an examination of the bottom, which he knew to be unsound, it was held that the buyer was entitled to avoid the sale.⁵

Where a person sells an article with a material latent defect, without disclosing it to the buyer, he is guilty of a fraud,⁶ and so as to all defects not discoverable by the buyer, as where to his knowledge poison has been spilled upon fodder,⁷ or animals sold by him for breeding purposes are known by him to be impotent.⁸

¹ *Udell v. Atherton*, 7 Hurl. & N. 172; 30 L. J. Ex. 337.

² 4 Humph. 186.

³ *West v. Anderson*, 9 Conn. 104; 21 Am. Dec. 737; *Schneider v. Heath*, 3 Camp. 506; *Baglehole v. Walters*, 3 Camp. 154; *Henshaw v. Robins*, 9 Metc. 33; *Whitney v. Boardman*, 118 Mass. 247; *Gossler v. Eagle Sugar Ref. Co.*, 103 Mass. 331; *Smith v. Andrews*, 3 Ired. 6.

⁴ *Baglehole v. Walters*, *supra*.

⁵ *Schneider v. Heath*, 3 Camp. 506.

⁶ *Maynard v. Maynard*, 49 Vt. 297; *Graham v. Stiles*, 38 Vt. 578; *French v.*

Vining, 102 Mass. 135; 3 Am. Rep. 440; *Hanson v. Edgerly*, 29 N. H. 343; *Brown v. Montgomery*, 20 N. Y. 287; 75 Am. Dec. 404; *Brown v. Gray*, 6 Jones, 103; 72 Am. Dec. 563; *Singleton v. Kennedy*, 9 U. S. Mon. 222; *Hadley v. Clinton Importing Co.*, 13 Ohio St. 502; 82 Am. Dec. 454; *Cecil v. Spurger*, 32 Mo. 462; 83 Am. Dec. 140; *Paddock v. Strobbridge*, 29 Vt. 470; *Hughes v. Robertson*, 1 T. B. Mon. 215; 15 Am. Dec. 104; *Croyle v. Moses*, 90 Pa. St. 250; 35 Am. Rep. 654.

⁷ *French v. Vining*, 102 Mass. 135.

⁸ *Maynard v. Maynard*, 49 Vt. 297.

§ 231. **False Representations Amounting to Fraud.**—

A false representation made by a seller and known to him to be such, by reason of which the purchaser is induced to buy, is a fraud which will avoid the contract.¹ The following, it is said,² are examples of representations which are held to establish fraud in the sale of goods, viz.: where the vendor sells a note which he knows has been paid;³ where he misrepresents the amount of the previous sales of a patented article which he is offering to sell;⁴ where he misrepresents the profits of the business;⁵ where he states falsely that the property he is selling is free from incumbrances;⁶ where the vendor of a note states that the makers are "wealthy and responsible men;"⁷ where the seller states that a farm yielded a certain quantity of hay;⁸ where he sells property when it does not really exist;⁹ where he falsely states that railroad bonds are secured by first mortgage.¹⁰

So the buyer may be guilty of false representations amounting to a fraud. Such devices may, it is said,¹¹ assume a variety of forms, but the more common consist of misrepresentations of the credit and financial standing of the buyer,¹² and of his identity or business connections with other men,¹³ of forged recommendations of

¹ *Walker v. Dunlop*, 5 Hayw. (Tenn.) 271; 9 Am. Dec. 787; *Bean v. Herrick*, 12 Me. 262; 28 Am. Dec. 176; *Campbell v. Hillman*, 15 R. Mon. 508; 61 Am. Dec. 195.

² *Tiedeman on Sales*, § 164.

³ *Neff v. Clute*, 12 Barb. 466; *Sibley v. Hulbert*, 15 Gray, 509.

⁴ *Crossland v. Hall*, 33 N. J. (Eq.) 111; *Miller v. Barber*, 66 N. Y. 533; *Somers v. Richards*, 46 Vt. 170.

⁵ *Taylor v. Saurman*, 110 Pa. St. 3.

⁶ *Ward v. Weman*, 17 Wend. 193; *Haught v. Hoyt*, 19 N. Y. 464; *Masson v. Bovet*, 1 Denio, 69.

⁷ *Alexander v. Dennis*, 9 Port. 174.

⁸ *Coon v. Atwell*, 46 N. H. 510; *Martin v. Jordan*, 60 Me. 531.

⁹ *Wordell v. Foadick*, 13 Johns. 325.

¹⁰ *Clark v. Edgar*, 84 Mo. 106.

¹¹ *Tiedeman on Sales*, § 168.

¹² *Lucky v. Roberts*, 25 Conn. 436; *Oary v. Hotelling*, 1 Hill, 311; *Olmstead v. Hotelling*, 1 Hill, 817; *Van Neste v. Conover*, 20 Barb. 547; *Hunter v. Hudson River Iron Co.*, 20 Barb. 494; *Eaton v. Avery*, 83 N. Y. 31; *Nangatuck Cutlery Co. v. Babcock*, 22 Hun, 481; *Devoe v. Brandt*, 53 N. Y. 462; *Gregory v. Schoenell*, 55 Ind. 101; *Lyon v. Briggs*, 14 R. I. 222; *Cain v. Dickinson*, 60 N. Y. 371; *Genesee Co. Sav. Bk. v. Mich. Barge Co.*, 52 Mich. 164; *Cochran v. Stewart*, 21 Minn. 435; *Williams v. Given*, 6 Gratt. 288.

¹³ *Barker v. Dinmore*, 72 Pa. St. 437; *Kingsford v. Merry*, 1 H. & N. 503; *McCrillis v. Allen*, 57 Vt. 505; *Aborn v. Merchants' Despatch Co.*, 135 Mass. 263;

others,¹ and the transfer in payment of the price of worthless securities,² counterfeit money,³ stolen goods,⁴ or of checks which will not be honored on account of want of funds.⁵

§ 232. **Non-Disclosure by Purchaser.**—A buyer of chattels is not obliged to disclose facts within his knowledge, which would materially affect the negotiation, as for example facts which would enhance their value⁶ or facts which relate to his own ability to pay for them.⁷ But if

Radcliffe v. Dallinger, 141 Mass. 1; *Alexander v. Swackhamer*, 105 Ind. 81; *Hardman v. Booth*, 32 L. J. (N. S.) Ex. 105.

¹ *Mowrey v. Walsh*, 8 Cow. 338.

² *Manning v. Albee*, 11 Allen, 590.

³ *Arnett v. Cloudas*, 4 Dana, 300; *Green v. Humphrey*, 50 Pa. St. 212; *Cochran v. Stewart*, 21 Minn. 435; *White v. Garden*, 10 C. B. 919; *Harner v. Fisher*, 58 Pa. St. 453; *Williams v. Given*, 6 Gratt. 268.

⁴ *Titcomb v. Wood*, 38 Me. 563; *Arendale v. Morgan*, 5 Sand. 703; *Lee v. Portwood*, 41 Miss. 109.

⁵ *Hawes v. Crowe*, Ryan & M. 414; *Hodgson v. Barrett*, 33 Ohio St. 63; *Bristol v. Wiltmore*, 1 B. & C. 514.

⁶ *Laidlaw v. Organ*, 3 Wheat. 178; *Smith v. Beatty*, 2 Ired. (Eq.) 456; *Butler's Appeal*, 26 Pa. St. 63; *Kintzing v. McElrath*, 5 Pa. St. 467; *Harris v. Tyson*, 24 Pa. St. 347; *Matthews v. Bliss*, 22 Pick. 48.

⁷ Where a man buys goods he either expressly or impliedly promises to pay for them. And a promise to pay for goods by a party whose object is to obtain them from the owner with his consent through the form of purchase, when the party knows that he is insolvent and intends never to pay for them, is fraudulent. *Donaldson v. Farwell*, 98 U. S. 631; *Stewart v. Emerson*, 52 N. H. 301; *Jordan v. Osgood*, 109 Mass. 457; *Dow v. Sanborn*, 3 Allen, 181; *Hennequin v. Naylor*, 24 N. Y. 139; *Wright v. Brown*, 67 N. Y. 1; *Allen v. Hartfield*, 76 Ill. 358; *Thompson v. Rose*, 16 Conn. 71; *Ayers v. French*, 41 Conn.

142; *Shipman v. Seymour*, 40 Mich. 274; *Carnahan v. Bailey*, 28 Fed. Rep. 579; *Talcott v. Henderson*, 31 Ohio St. 162. But this intention must be absolute. It is not fraudulent if the intention was only not to pay for them at the time agreed upon, but the party honestly intended to pay for them at some other time. *Biedault v. Wales*, 20 Mo. 546; *Mitchell v. Worden*, 20 Barb. 253; *Buckley v. Altcher*, 21 Barb. 585. And such fraudulent intention must exist prior to the sale. A subsequent change of mind does not avoid the sale. *Burrill v. Stevens*, 73 Mo. 325; *Parker v. Byrnes*, 1 How. 537; *Cross v. Peters*, 1 Greenl. 378; *Rowley v. Bigelow*, 12 Pick. 307; *Biggs v. Barry*, 2 Curt. C. C. 259.

The reason for the rule as first given is that the promise to pay implies a representation by the party that he has confidence in his ability to pay and really intends to pay, and the concealment of his insolvency with an intention not to pay renders the promise a fraudulent misrepresentation.

On the other hand omission of a purchaser to disclose his insolvency, unaccompanied with an intention not to pay, does not make the promise to pay fraudulent, for it is often the case that the purchaser relies, for his ability to pay, upon his credit alone, and is not disappointed. *Morrill v. Blackman*, 42 Conn. 324; *Nichols v. Pinner*, 18 N. Y. 236; *Morris v. Talcott*, 96 N. Y. 100; *Talcott v. Henderson*, 31 Ohio St. 162. And while a man is really struggling against adversity, with an honest intent to retrieve his fortunes, he may make a

the buyer has taken upon himself an obligation to furnish information, then his failure to disclose will be a fraud ¹ as it will also where he seeks to mislead by disclosing half of the truth.²

So a purchaser of real property is not obliged to disclose a fact which, unknown to the seller, increases its value.³ In a leading English case where A purchased a piece of land from B, keeping from B the fact that there was, unknown to him, a mine under the land, it was held that A was under no legal obligation to disclose it to B.⁴ In *Coddington v. Goddard*,⁵ the purchaser in New York knew of an advance in the price of copper in Europe, but his broker in Boston was ignorant of the advance, and on being asked by the seller, just before the sale, whether there was any advance, replied, "None that I know of." It was held that there was no such concealment as would invalidate the contract.

(b) *Representation of Fact.*

§ 233. **Matters of Opinion.** — The representation must be of a matter of fact, for a mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. An illustration of the difference between opinion and representation is found in the difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an

valid purchase on credit, although he does not disclose the extent of his embarrassments, for in such a case there is wanting the fraudulent design never to pay. *Henshaw v. Bryant*, 4 Scam. 97; *Patton v. Campbell*, 70 Ill. 72.

¹ *Dambmann v. Schulting*, 75 N. Y.

² *Tiedeman on Sales*, § 171, citing *Turner v. Harvey*, Jacob, 178; *Bench v. Sheldon*, 14 Barb. 66; *Prescott v. Wright*, 4 Gray, 461; *Paul v. Hadley*, 23 Barb. 521; *Dambmann v. Schulting*, 75 N. Y.

62; *Smith v. Countryman*, 39 N. Y. 655; *Howard v. Gould*, 28 Vt. 523; *Hadley v. Clinton Co.*, 18 Ohio St. 502. And see *Mallory v. Leach*, 35 Vt. 156; *Kidney v. Stoddard*, 7 Met. 252.

³ *Fox v. Mackreth post*; *Harris v. Tyson*, 24 Pa. St. 347; 64 Am. Dec. 681; *Laidlaw v. Organ*, 2 Wheat. 178; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 282.

⁴ *Fox v. Mackreth*, 2 Brown Ch. 420; *Smith v. Beatty*, 2 Ired. (Eq.) 456; 40 Am. Dec. 435.

⁵ 82 Mass. 463.

opinion which the buyer may adopt if he will,¹ the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.² Thus to say that the subject-matter of the sale was "good oil land" has been held not fraudulent,³ while to say that a business is profitable,⁴ or that an old stock of goods was "fresh and new" was.⁵

§ 234. **Matters of Intention.** — An expression of intention, as we have seen,⁶ does not amount to a statement of fact; therefore false promises of the vendor to do something in the future for the vendee as well as false representations as to what the vendee could do with the property do not constitute fraud,⁷ and the same has been held as to representations by the purchaser that if a contract were to be made he had capital, and would make improvements which would induce the immigration of mechanics, etc.⁸

§ 235. **Matters of Law.** — False representations of law or of the legal effect of a contract will not sustain an action of deceit or justify a court in rescinding a contract, except where some relation of confidence and trust existed between the parties, or where one, by reason of his ignorance or unfamiliarity with business, was compelled to rely and did rely on the superior knowledge of the other.⁹ But it is

¹ *Nowlan v. Cain*, 3 Allen, 263; *Chester v. Comstock*, 6 Robt. 1; *Noetting v. Wright*, 72 Ill. 390; *Davis v. Meeker*, 5 Johns. 254; *Gordon v. Butler*, 105 U. S. 553; *Cagney v. Ouseon*, 77 Ind. 494; *Ellis v. Andrews*, 56 N. Y. 83; *Furman v. Titus*, 40 N. Y. 234; *Miller v. Young*, 36 Ill. 354; *Anderson v. Hill*, 12 S. & M. 679; *Com. v. Jackson*, 132 Mass. 16; *Hemmer v. Cooper*, 8 Allen, 334; *Cooper v. Lovering*, 106 Mass. 79; *Holbrook v. Connor*, 60 Me. 578.

² *Harvey v. Young*, Yelv. 20; *Lindsay Pet. Co. v. Hurd*, L. R. 5 C. P. 243; *Ives v. Carter*, 24 Conn. 403; *Somers v. Richards*, 46 Vt. 170; *Simar v. Canaday*, 53 N. Y. 296; *Chryslar v. Canaday*, 90 N. Y. 272; *Jackson v. Collins*, 39 Mich. 557.

³ *Watts v. Cummings*, 59 Pa. St. 84.

⁴ *Tiedeman on Sales*, citing *Cruess v. Fessler*, 39 Cal. 336; *Somers v. Richards*, 46 Vt. 170; *Miller v. Barber*, 66 N. Y. 558; *Crossland v. Hall*, 33 N. J. (Eq.) 111.

⁵ *Jackson v. Collins*, 39 Mich. 557.

⁶ *Ante*, § 217; *Misrepresentation*.

⁷ *Tiedeman on Sales*, citing *Long v. Woodman*, 58 Me. 52; *Gordon v. Parmlee*, 2 Allen, 212; *Pedrick v. Porter*, 5 Allen, 324; *Mooney v. Miller*, 102 Mass. 217.

⁸ *Lawson Rights, Rem. & Pr.*, § 2345.

⁹ *Platt v. Scott*, 6 Blackf. 389; 39 Am. Dec. 438; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Fish v. Cleland*, 33 Ill. 238; *Drake v. Latham*, 50 Ill. 270; *Dillman v. Nadlehofer*, 119 Ill. 567; *Ins. Co. v. Reed*, 31 Ohio St. 293;

held that fraudulent representations as to the legal operation and effect of an instrument will be sufficient to avoid the same, when made to a party who is unable to judge of its true character and construction.¹ And a false representation as to a foreign law, or a private act, stands on a different footing, since a man is not presumed to know them.²

(c) *By Party Charged.*

§ 236. **Fraud of Third Party.**—The representation must have been made by the other party to the contract or by his agent or with his connivance,³ for a contract is not affected by the fraud of a third person in which the other party was not implicated. “There is no case in which a fraud intended by one man shall overturn a fair and bona fide contract between two others.”⁴

(d) *Knowledge of Falsehood.*

§ 237. **Representation Must be Knowingly False.**—A representation made with a belief in its truth, though not true in point of fact, is not a legal fraud.⁵ Yet it seems

Upton v. Tribilcock, 91 U. S. 45; *Wheaton v. Wheaton*, 9 Conn. 96; *Pinkham v. Greer*, 3 N. H. 163; *Townsend v. Coles*, 31 Ala. 428; *Clem v. Newcastle, etc.*, 9 Ind. 488; 68 Am. Dec. 653; *Grant v. Grant*, 56 Me. 573; *Mooreland v. Atchison*, 19 Tex. 303; *Simms v. Ferrel*, 45 Ga. 535.

¹ *Berry v. Whitney*, 40 Mich. 71.

² *Lawson Presumptive Ev.*, Rule 2, p. 14; *Boyers v. Pratt*, 1 Humph. 90; *Haven v. Foster*, 9 Pick. 112; *King v. Dolittle*, 1 Head, 77.

³ *Adams v. Soule*, 33 Vt. 538; *Kenner v. Harding*, 85 Ill. 284; *Witherwax v. Riddle*, 121 Ill. 140. Where a person wrote a letter stating his willingness to grant a lease, for the purpose of the letter being shown to a person proposing to lend money to the lessee upon the security of the lease; and it appeared that he had before granted a concurrent lease of the same property, which he alleged that he had forgotten, it was

held that he was responsible for his statement and for the repayment of the loan made upon the faith of it. *Slim v. Croucher*, 2 Giff. 37. In another English case, *Rawlins v. Wickham*, 3 De S. & J. 304, two persons in a bank, upon treaty with an incoming partner, joined in presenting to him a false statement of the affairs of the bank, by which he was induced to become a partner; the statement was false to the knowledge of one of them, who was acquainted with the affairs of the bank, but not to the knowledge of the other, who joined in it in reliance upon his partner. It was held that the incoming partner was entitled to rescind the contract and to claim restitution against both partners.

⁴ *Master v. Miller*, 4 T. R. 337.

⁵ *Ormrod v. Huth*, 14 Mees. & W. 664; *Evans v. Collins*, 5 Q. B. 804; *Haycroft v. Creasy*, 2 East, 92; *Taylor v. Ashton*, 11 Mees. & W. 401; *Rawlings v. Bell*, 1 Com.

that if the representation is of a material fact, and induces the contract by one relying on it, it is, even when innocently made, a good ground for setting aside the contract.¹ In *Bower v. Fenn*,² it was held that on a sale of a business establishment, if the purchaser has no knowledge of the business, and relies on the seller's statement as to the value, and the seller knows of such reliance, and those statements are false, to the purchaser's injury, although the seller believed them true, the purchaser may be relieved.³

§ 238. **Or Not Known to be True.**— And where persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they are as responsible as if they had asserted that which they knew to be untrue. Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is as unjustifiable as the affirmation of what is known to be false.⁴ And the same is true where the party is negligent, or ought to have known or remembered the truth, and did not.⁵

B. 951; *Shrewsbury v. Blount*, 2 Man. & G. 475; *Griswold v. Sabin*, 51 N. H. 167; 12 Am. Rep. 76; *Mamlock v. Fairbanks*, 46 Wis. 415; 32 Am. Rep. 716.

¹ *Shackleford v. Handley*, 1 A. K. Marsh. 496; 10 Am. Dec. 753.

² 90 Pa. St. 359; 35 Am. Rep. 662.

³ See also *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313.

⁴ *Donaldson v. Young*, Meigs. 155; *Snyder v. Findley*, 1 N. J. (L.) 78; 1 Am. Dec. 193; *Thompson v. Tate*, 1 Murph. 97; 3 Am. Dec. 678; *Waters v. Mattingly*, 1 Bibb. 244; 4 Am. Dec. 681; *Munroe v. Pritchett*, 16 Ala. 785; 50 Am. Dec. 203; *Alvarez v. Brannan*, 7 Cal. 508; 68 Am. Dec. 274; *Frenzel v. Miller*, 37 Ind. 1; 10 Am. Rep. 62; *Smith v. Richards*, 13 Pet. 26; *Smith v. Babcock*, 3 Wood. & M. 246; *Foster v. Kennedy*, 23 Ala. 359; 81 Am. Dec. 56; *Terhune v. Dever*, 36 Ga. 648; *Harding v. Randall*, 15 Me. 332; *Hazard v.*

Irwin, 18 Pick. 95; *Bennett v. Judson*, 21 N. Y. 238; *Hubbard v. Briggs*, 31 N. Y. 518, 540; *People v. Sully*, 5 Park. Cr. 142; *Craig v. Ward*, 36 Barb. 377; *Sharp v. New York*, 40 Barb. 256; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Case v. Ayers*, 65 Ill. 143; *Ruff v. Janett*, 94 Ill. 475; *Stone v. Denny*, 4 Metc. 151; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cabot v. Christie*, 42 Vt. 121; *Cooper v. Schlesinger*, 111 U. S. 148; *Cole v. Cassidy*, 138 Mass. 437; *Walsh v. Morse*, 80 Mo. 568; *Caldwell v. Henry*, 76 Mo. 254; *Johnson v. Berney*, 9 Ill. App. 64; *Eaton v. Winnie*, 20 Mich. 156; *Stone v. Covell*, 29 Mich. 359; *Woodruff v. Garner*, 27 Ind. 4; *Marsh v. Falke*, 40 N. Y. 562; *Bristol v. Braidwood*, 28 Mich. 191.

⁵ *East v. Matheny*, 1 A. K. Marsh. 192; 10 Am. Dec. 721; *Pulsford v. Rhoad*, 17 Beav. 94.

§ 239. **Representation Subsequently Becoming False or True.**—A representation not known to be false when made, but discovered to be false before the contract induced by it is sought to be enforced, is fraudulent, and the contract may be resisted on this ground.¹ On the other hand a representation that was false at the time it was made may, by a change of circumstances, become a true representation at the time it is acted upon.²

(e) *Intention that it be Acted Upon.*

§ 240. **Representation made without such Intention.**—The representation must be made with the intention that it shall be acted on by the injured party.³ Thus where the directors of a company made false representations in their prospectus asking for original subscriptions to the stock, it was held that their liability did not extend beyond the first applicants, so as to include persons who subsequently purchased shares which came into the market, the ground of this decision being that their intention to deceive could not be supposed to extend beyond the first applicants for shares.⁴

§ 241. **Need not be made to Injured Party.**—But the representation need not be made directly to the injured party.⁵ In *Langridge v. Levy*,⁶ the defendant sold a gun to the father of the plaintiff for the use of himself and his sons, representing that the gun had been made by Nock and was “a good, safe, and secure gun:” the plaintiff used the

¹ *Reynall v. Sprye*, 1 De G. M. & G. 660; *Trille v. Bernay*, 4 Id. 318. In *Redgrave v. Hurd*, 20 Ch. Div. 13, Jessel, M. R., said: “Assuming that fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements.”

² *Ship v. Croskill*, L. R. 10 Eq. 73.

³ *Barry v. Croskey*, 2 J. & H. 1; *Davidson v. Nichols*, 11 Allen, 514; *Victor v. Henlein*, 33 Hun, 549; *Lundaur v. Hay*, 61 Ia. 663.

⁴ *Peek v. Gurney*, L. R. 6 H. L. 377, 410.

⁵ *Rice v. Manley*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. 786; *Snow v. Judson*, 38 Barb. 210.

⁶ 2 M. & W. 519.

gun ; it exploded, and so injured his hand that amputation became necessary. He sued the defendant for the false representation, and the jury found that the gun was unsafe, was not made by Nock, and found generally for the plaintiff. It was urged that the defendant could not be liable to the plaintiff for a representation not made to him ; but the Court of Exchequer held that, inasmuch as the gun was sold to the father to be used by his sons, and the false representation made in order to effect the sale, and as " there was fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." So it has been held that a chemist who sells a bottle of liquid made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair.¹ And a druggist, who negligently labels a deadly poison as a harmless medicine and sells it so labeled to dealers in such articles, is liable for an injury to any one who afterwards purchases and uses it, if there is no negligence on the part of the intermediate sellers or of the person injured.² So as to representations made to commercial agencies by business men regarding their financial responsibility. Where such representations are made falsely with the design of procuring large credit and defrauding persons acting in reliance on them, an action of deceit will lie.³

(f) *Must be Relied on.*

§ 242. Representation Must Actually Deceive — Knowledge of Falsity. — It is essential that the represen-

¹ *George v. Skivington*, L. R. 5 Ex. 1.

² *Thomas v. Winchester*, 2 Seld. 397; *Davidson v. Nichols*, 11 Allen, 519; *McDonald v. Snelling*, 14 Allen, 290; *Well-*

ington v. Dawner Kerosene Oil Co., 104 Mass. 64.

³ *Eaton v. Avery*, 83 N. Y. 31; *Genesee County Savings Bank v. Mich. Barge Co.*, 52 Mich. 164.

tation actually deceived, *i. e.*, that it was relied on by the other party.¹ Where a person notwithstanding the representation of another relies upon his own judgment of the matter and gives no weight to the representation, it cannot be said that he was injured by it and hence it is no fraud as to him.² But at the same time one guilty of fraudulent misrepresentation will not be allowed to allege the negligence of another in relying upon it under circumstances justifying belief.³

For the same reason a representation which the other party knows to be untrue cannot have induced the contract and ought not be allowed to avoid it.⁴ So where the means of knowledge are within his power and close at hand he will be presumed to have had such knowledge,⁵ as in an old case where a person induced another to carry goods for him at so much per hundred-weight, by a false statement of the weight of the goods, this was held no fraud, because the carrier might have ascertained the correct weight for himself.⁶ In another case a farm was sold under the description of being in a "ring-fence." The purchaser saw the farm before the purchase, had lived in the neigh-

¹ In *Horsfall v. Thomas*, 1 H. & C. 90, the defendant had bought a cannon of the plaintiff. The cannon had a defect which made it worthless, and the plaintiff had endeavored to conceal this defect by the insertion of a metal plug in the weak spot in the gun. The defendant never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that the attempted fraud having had no operation upon the mind of the defendant did not exonerate him from paying for the gun. "If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him."

² *Brown v. Gray*, 6 Jones, 103; 72 Am. Dec. 563; *Hall v. Thompson*, 1 Sm. & M.

481; *Slaughter v. Gerson*, 18 Wall. 379; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Hagee v. Grossman*, 31 Ired. 223.

³ *Linnington v. Strong*, 107 Ill. 302; *Ladd v. Pigott*, 114 Ill. 647; *Endsley v. Johns*, 120 Ill. 469; *Hicks v. Stevens*, 121 Ill. 186; *Moad v. Runn*, 32 N. Y. 275; *David v. Park*, 103 Mass. 501.

⁴ *Anderson v. Burnett*, 5 How. (Miss.) 165; 35 Am. Dec. 435; *Ely v. Stewart*, 1 Md. 408; *Bell v. Henderson*, 6 How. (Miss.) 313.

⁵ *Montgomery v. Scott*, 9 S. C. 20; 30 Am. Rep. 1; *Poland v. Brownell*, 131 Mass. 138; 41 Am. Rep. 215; *Dugan v. Cureton*, 1 Ark. 31; 31 Am. Dec. 727; *Moore v. Turbeville*, 2 Bibb, 602; 5 Am. Dec. 642; *Williams v. Hicks*, 2 Vt. 38; 19 Am. Dec. 693; *Foley v. Cowgill*, 5 Blackf. 18; 32 Am. Dec. 49; *Watson v. Planters Bk.*, 22 La. Ann. 14; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406.

⁶ *Bayley v. Merrell*, Cro. Jac. 386.

borhood, and must have known whether it did lie in a ring-fence or not. It was held that he was liable on the contract, notwithstanding the farm was so misdescribed.¹

But on the other hand, where a person in fact relies upon the representation, as intended by the party making it, he may be entitled to avoid the agreement, notwithstanding he had the means of information, of which he did not avail himself. And in general, where a false representation is in fact made, the burden of proof lies upon the party making it to show not only that the other party had the means of information, but that he relied upon his own information or judgment, and was not in fact misled by the representation.² Where the sale of a business was effected by means of misrepresentations of its value, it was ruled that the buyer might avoid the sale as having been induced by such representations, although he had access to the books and works, and might have inspected them and formed his own judgment.³

§ 243. Must be Material and have Induced Contract. — The representation must be material, — that is, it must have induced the contract, — otherwise it will not be a ground for avoiding it.⁴ It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it; it must be the very ground on which the transaction has taken place.⁵

§ 244. Representation as to One of Several Matters. — A representation as to one of several matters that is

¹ *Dyer v. Hargrave*, 10 Ves. 505.

² *Lawson Rights*, Rem. & Pr., § 2355; *Lysney v. Selby*, 2 Ld. Ray. 1118; *Holbrook v. Burt*, 22 Pick. 546; *Fishback v. Miller*, 15 Nev. 428.

³ *Dobell v. Stevens*, 3 Barn. & C. 623; *Rawlins v. Wickham*, 3 De Gex & J. 304

⁴ *Connersville v. Wadleigh*, 7 Blackf.

102; 41 Am. Dec. 214; *Geddes v. Perrington*, 5 Dow. 159; *Grier v. Gosden*, 3 M. & G. 446; *Vernon v. Keys*, 12 East. 632.

⁵ *Adams v. Schiffer*, 11 Colo. 15; 7 Am. St. Rep. 202. A warranty, for example, made after the sale is complete cannot affect it. *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834.

material, or a representation including several matters that is false in one material point, is sufficient to vitiate the whole agreement.¹ And the fraudulent representation need not have been the sole inducement to the making of the agreement.² And although the false representation affects part only of the agreement it in general vitiates it *in toto*.³

(g) *Damage to Party Deceived.*

§ 245. **Damage Essential.** — If the party deceived has suffered no damage by the misrepresentation of the other, there is no fraud which will sustain an action against the latter.⁴ Therefore, it is no fraud to induce a debtor by a fraudulent misrepresentation to pay his just debt.⁵

§ 246. **Remedy of Party Defrauded — He may affirm Contract.** — On discovering the fraud an election is given to the party defrauded. An agreement procured by fraud or mistake is voidable, not void,⁶ and hence one may affirm the contract and sue for such damages as the fraud has occasioned.⁷

¹ *Reynell v. Sprye*, 21 L. J. Ch. 660; *Hollows v. Fernie*, L. R. 3 Eq. 539; 36 L. J. Ch. 273.

² *Ruff v. Jarrett*, 94 Ill. 475; *Hicks v. Stevens*, 121 Ill. 186; *Safford v. Grout*, 120 Mass. 20; *Morgan v. Skiddy*, 62 N. Y. 319; *Peck v. Derry*, 37 Ch. D. 541.

³ *Lawson Rights, Rem. & Pr.*, § 2356.

⁴ *Tiedeman on Sales*, citing *Weaver v. Wallace*, 9 N. J. (L.) 251; *Sledge v. Scott*, 56 Ala. 296; *Neidefer v. Chastian*, 71 Ind. 363; *Morrison v. Lods*, 39 Cal. 385; *Pasley v. Freeman*, 3 T. R. 51; *Vernon v. Keyes*, 12 East, 637; *Philpps v. Buckman*, 30 Pa. St. 402; *Castleman v. Griffin*, 13 Wis. 535; *Fisher v. Mellen*, 108 Mass. 505; *Page v. Bent*, 3 Metc. 374; *Stiles v. White*, 11 Neb. 356; *Milliken v. Thorndike*, 103 Mass. 386; *Hanson v. Edgerton*, 29 N. H. 357; *Hart v. Tallmadge*, 2 Day (Conn.), 382; *Young v. Hall*, 4 Ga. 95; *Bartlett v. Blaine*, 83 Ill. 25; *Hughes v. Sloan*, 2 Ark. 146; *Hagee v. Grossman*, 31 Ind. 223; *Weatherford v.*

Fishback, 3 Scam. (Ill.) 770; *White v. Wheaton*, 7 N. Y. 352; *Merrill v. Horn*, 45 N. H. 422; *Randall v. Hazleton*, 12 Allen, 414; *Medbury v. Watson*, 6 Met. 246; *Adams v. Page*, 7 Pick. 542; *First Nat. Bk. v. Yocum*, 11 Neb. 328; *Wiley v. Howard*, 15 Ind. 169; *Weist v. Grant*, 71 Pa. St. 95; *Fuller v. Hodges*, 25 Me. 248.

⁵ *Brown v. Blunt*, 73 Me. 445; *Marsh v. Cook*, 32 N. J. (Eq.) 262. See *Clark v. Tennant*, 5 Neb. 549; *Mo. Valley Land Co. v. Bushnell*, 11 Neb. 192; *First Nat. Bk. v. Yocum*, 11 Neb. 328; *Bartlett v. Blaine*, 83 Ill. 25.

⁶ *Smith v. Hornback*, 4 Litt. 232; 14 Am. Dec. 122; *McCorkle v. Doby*, 1 Strobb. 396; 47 Am. Dec. 560; *Nyton v. Thurlow*, 23 Kan. 90; *Brown v. Pierce*, 97 Mass. 46; 93 Am. Dec. 57.

⁷ *Houldemith v. City of Glasgow Bk*, 5 App. Cas. 323; *Tiedeman on Sales*, citing *Clark v. Dickson*, El. Bl. & El.

§ 247. **Same — Or Rescind Contract.** — Or the party defrauded may rescind the contract and having done so resist an action brought upon it at common law; or resist specific performance when sought in equity; or obtain a judicial avoidance of the contract in equity; or in the case of a vendor of goods recover the property by process of law from the vendee;¹ or in some cases from any one into whose hands it may have gone.² The election to rescind may be by express words or by acts evidencing an intention to treat the contract as not binding.³

§ 248. **Limits to Right to Rescind.** — While a man may keep the contract open till he is sued upon it, and a plea of fraud then set up is a sufficient rescission of the contract,⁴ yet so long as he keeps it open he does so at his own risk. His right to avoid it may be determined either by his accepting some benefit under the contract, or otherwise acting upon it after he has become aware of the fraud;⁵

148; *South., etc., R. Co. v. Guest*, 34 Fed. Rep. 628; *Western Bk. v. Addie*, L. R. 1 H. L. Cas. 167; *Queen v. Saddlers Co.*, 10 H. L. Cas. 421.

¹ *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394; *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 697; *Knowles v. Lord*, 4 Whart. 500; 34 Am. Dec. 525; *Cary v. Hotelling*, 1 Hill, 311; 37 Am. Dec. 323.

² On a sale of goods, where the parties intend that it shall be a cash sale, the purchaser by securing possession of the goods cannot transfer any property in them, until they are paid for, and his creditors cannot hold them against the vendor. *Kinsey v. Leggett*, 71 N. Y. 387; *Dean v. Yates*, 22 Ohio St. 388; *Decan v. Shipper*, 35 Pa. St. 239; *Wiggin v. Day*, 9 Gray, 97; *Dow v. Sanborn*, 3 Allen, 181; *Pike v. Wieting*, 49 Barb. 314; *Hall v. Naylor*, 6 Duer, 74; *King v. Phillips*, 8 Bosw. 603; *Hoffman v. Strohecker*, 7 Watts, 86; 32 Am. Dec. 740; *Mackinley v. McGregor*, 3 Whart. 369; *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630.

³ *Lawson Rights, Rem. & Pr.*, § 2359.

⁴ The right for example to rescind for fraud is not defeated by the vendor's having obtained judgment for the price in ignorance of the fraud. *Kraus v. Thompson*, 30 Minn. 64; 44 Am. Rep. 182.

⁵ *McCulloch v. Scott*, 13 B. Mon. 172; 56 Am. Dec. 561; *Brainley v. Tibbets*, 7 Me. 70. He cannot rescind where he has mingled the property with his own or offered it for sale, or in any other way exercised any rights of ownership over the goods. *Campbell v. Fleming*, 1 Ad. & E. 40; *Towers v. Barrett*, 1 T. R. 133; *Okell v. Smith*, 1 Stark. 107; *Milner v. Tucker*, 1 C. & P. 15; *Cash v. Gilles*, 3 C. & P. 407; *Grimaldi v. White*, 4 Esp. 95; *Thurston v. Blanchard*, 22 Pick. 20; *Boorman v. Johnson*, 12 Wend. 506; *Hoadley v. House*, 32 Vt. 129; *Sands v. Taylor*, 5 Johns. 395; *Kimball v. Cunningham*, 4 Mass. 502; *Poulton v. Lattimore*, 9 Barn. & C. 259; *Parker v. Palmer*, 4 Barn. & Ad. 387; *Street v. Blay*, 2 Barn. & Ad. 464; *Groning v. Mendham*, 1 Stark. 257; *Fisher v. Samuda*, 1 Camp. 190.

or by the subject-matter of the contract being so dealt with that the parties cannot be re-instated in their former position;¹ or by innocent third parties acquiring an interest for value under the contract.

The rescission must extend to the whole contract; it cannot be rescinded in part and be affirmed as to part.² If it cannot be rescinded *in toto* the party complaining must resort to his action for damages.³

If the existence of fraud is ultimately established by competent evidence the right to rescind the contract will not depend upon the defrauded party's absolute knowledge

¹ And he must restore the consideration. After consuming the property either wholly or partly a buyer cannot rescind the contract, for in this case he is unable to put the other party in *status quo*. "There must," says an author just quoted (Tiedeman on Sales, §163), "be a prompt and complete restoration of everything of value which the party defrauded had received under the contract." Norton v. Young, 3 Greenl. 80; Sumner v. Parker, 86 N. H. 449; Willoughby v. Moulton, 47 N. H. 205; Perley v. Balch, 23 Pick. 286; Jennings v. Gage, 13 Ill. 610; Coolidge v. Brigham, 1 Met. 550; Miner v. Bradley, 23 Pick. 457; Weeks v. Roble, 42 N. H. 316; Cushman v. Marshall, 21 Me. 122; Thompson v. Peck, 115 Ind. 513; Burton v. Stewart, 3 Wend. 239; Collins v. Townsend, 58 Cal. 615; Kimball v. Cunningham, 4 Mass. 502; Getchell v. Chase, 87 N. H. 110; Sanborn v. Batchelder, 61 N. H. 434; Gifford v. Carvill, 39 Cal. 593; Schiffer v. Dietz, 83 N. Y. 300; Monahan v. Noyes, 52 N. H. 232; Bell v. Keepers, 39 Kan. 105; Downer v. Smith, 32 Vt. 7; Jennison v. Woodruff, 34 Ala. 148; Strong v. Strong, 102 N. Y. 69; Shepherd v. Temple, 3 N. H. 457; Bacon v. Brown, 4 Bibb, 91; Christy v. Cummins, 2 McLean. 386; Carter v. Walker, 3 Rich 40; Conner v. Henderson, 5 Mass. 314; Shaw v. Barnhart, 17 Ind. 183; Haase v. Mitchell, 58 Ind. 213; Smith v. Butterham, 98 Ill. 188; Morrison v. Lods, 39 Cal. 381; Fitz v. Bynum, 55 Cal. 459; Merritt v. Robinson, 35 Ark. 483; Rose v. Hurley,

39 Ind. 77; Dowes v. Griswold, 4 Hun, 556; Farrell v. Corbett, 4 Hun, 123; Van Lieu v. Johnson, 4 Hun, 415. If it is of any value to the other party it must be returned. Perley v. Balch, 23 Pick. 283; Thayer v. Turner, 8 Met. 552. But things which have no value to any one need not be returned, as, for example, worthless securities or counterfeit money. Brewster v. Burnett, 125 Mass. 68; Pence v. Langdon, 99 U. S. 578; Smith v. Smith, 30 Vt. 139; Royce v. Watrous, 7 Daly, 87; 73 N. Y. 597; Hess v. Young, 59 Ind. 379; Poulton v. Lattimore, 9 B. & C. 259; Dickinson v. Hall, 14 Pick. 217; Conner v. Henderson, 15 Mass. 322; Becker v. Vroman, 13 Johns. 302; Taft v. Wildman, 15 Ohio, 123; Donelson v. Young, 1 Meigs, 155; Shepherd v. Temple, 3 N. H. 455; Knapp v. Lee, 3 Pick. 457; Perley v. Balch, 23 Pick. 283. Nor is a return required of what was necessarily destroyed in the attempt to discover the fraud, as in chemical and other tests of the quality of the goods. Smith v. Love, 64 N. C. 439; Pacific Guano Co. v. Mullen, 66 Ala. 582.

² Miner v. Bradley, 23 Pick. 457; Voorhees v. Earl, 2 Hill, 299; Coolidge v. Brigham, 1 Met. 550; Allen v. Webb, 24 N. H. 278; Lucy v. Bundy, 9 N. H. 298; Fallager v. Reville, 3 Hun, 600; Higham v. Harris, 106 Ind. 246; Preston v. Travelers Ins. Co., 58 N. H. 76.

³ Sheffield Nickel Co. v. Unwin, L. R. 2 Q. B. 214; Hynson v. Dunn, 5 Ark. 395; 41 Am. Dec. 100.

of the fraud. A party may rescind a contract on suspicions of fraud if these suspicions are subsequently verified.¹

§ 249. **Effect of Delay and Laches.** — Lapse of time, although it does not otherwise affect his right to rescind, is evidence to show that he intended to affirm, increasing in strength as the rescission is delayed.² So that by a delay for an unreasonable time the party defrauded will lose his right to rescind.³ But laches are not imputable to the party defrauded, until he has had such knowledge, or means of knowledge, as he was bound to avail himself of.⁴ And he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, it is sufficient.⁵

§ 250. **Remedy in Equity.** — Where an instrument has been obtained by fraud or mistake, or is held for fraudulent, inequitable or unconscionable purposes, a party may come into equity and ask that it be cancelled or delivered up.⁶ This equitable jurisdiction is exercised to prevent a wrong, and for fear that such instruments might afterwards be vexatiously or injuriously used, when the evidence to impeach them was lost, or that they might be already clouding the title or interest of the party, and also where

¹ *Peterson v. Chicago, etc., R. Co.*, 38 Minn. 511.

² *Clough v. R. R. Co.*, L. R. 7 Ex. 35; *Lindsey Pet. Co. v. Hurd*, L. R. 5 O. P. 240; *Gillespie v. Moon*, 2 Johns. Ch. 585; 7 Am. Dec. 559.

³ *Boughton v. Standish*, 48 Vt. 594; *Weeks v. Roble*, 42 N. H. 316; *Ross v. Titterton*, 6 Hun, 289; *Davis v. Betz*, 66 Ala. 206; *Hall v. Fullerton*, 69 Ill. 448; *Rose v. Hurley*, 39 Ind. 77; *Collins v. Townsend*, 58 Cal. 608; *Pence v. Langdon*, 99 U. S. 578; *Bell v. Keepers*, 39 Kan. 106; *St. John v. Hendrickson*, 81 Ill. 250; *Gatling v. Merrell*, 9 Ind. 572; *Farmlee v. Adolph*, 28 Ohio St. 10; *Hammond v. Pennock*, 61 N. H. 145; *Willoughby v.*

Moulton, 47 N. H. 265; *Whitcomb v. Denio*, 52 Vt. 382; *Mattison v. Holt*, 45 Vt. 336; *Smith's Case*, L. R. 2 Ch. 604.

⁴ *Brown v. Norman*, 65 Mass. 267; 7 Am. St. Rep. 663.

⁵ *Baker v. Lever*, 67 N. Y. 304; 23 Am. Rep. 117.

⁶ *Pomeroy's Eq. Jur.*, § 1377; *Hagar v. Shindler*, 29 Cal. 46; *Eckman v. Eckman*, 55 Pa. St. 269; *Downing v. Wherrin*, 19 N. H. 9; 49 Am. Dec. 139; *Rucker v. Dooley*, 49 Ill. 377; 95 Am. Dec. 615; *Holland v. Mayor*, 11 Md. 136; 69 Am. Dec. 196; *Polk v. Rose*, 25 Md. 153; 89 Am. Dec. 773; *Smith v. Smith*, 23 Wis. 176; 99 Am. Dec. 153; *Stanton v. Miller*, 65 Barb. 58.

he has a defense to them good in equity, but not capable of being made available at law.¹ Equity will decree the surrender of securities given by the debtor to a creditor on a secret preference under a composition agreement,² and the cancellation of notes or bonds given by him to induce a creditor to sign the composition.³

But this kind of relief is not given where the instrument is void on its face,⁴ nor where the party seeking relief was the sole guilty party, or where he had participated equally and deliberately in the fraud; nor where the agreement was founded on illegality, immorality, or some unconscionable conduct on his part;⁵ nor where the complainant has an adequate remedy at law.⁶

§ 251. **Remedy Independent of Contract.** — Outside of the right arising from the contract, the plaintiff has a common law action for deceit to recover the damage sustained by him,⁷ for fraud is a tort as well as a ground for avoiding a contract, and will sustain an action *ex delicto*. But mere misrepresentation, without a dishonest intention, though a ground for avoiding a contract,⁸ will not sustain the action *ex delicto*, *i. e.*, the action of deceit.⁹

§ 252. **Right to Recapture.** — And without the aid of the law the person defrauded of his property may recap-

¹ *Lawson Rights, Rem. & Pr.*, § 2305; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Hamilton v. Batlin*, 8 Minn. 403; 83 Am. Dec. 787; *Hamilton v. Cummings*, 1 Johns. Ch. 517.

² *Pleyer v. Browne*, 28 Beav. 391; *O'Shea v. Collier White Lead Co.*, 42 Mo. 397.

³ *Lawson Rights, Rem. & Pr.*, § 2309.

⁴ *Elliott v. Piersoll*, 1 McLean, 11; *Piersoll v. Elliott*, 6 Pet. 75; *Scott v. Onderdonk*, 14 N. Y. 9; 67 Am. Dec. 106; *Munson v. Munson*, 28 Conn. 532; 73 Am. Dec. 693; *Ward v. Dewey*, 16 N. Y. 519; *Vandoren v. Mayor*, 9 Paige, 388.

⁵ *Lawson Rights, Rem. & Pr.*, § 2305.

⁶ *Munson v. Munson*, *supra*.

⁷ *Anson on Contr.*, 162.

⁸ *Allen v. Hart*, 73 Ill. 104; *School Directors v. Boomhour*, 83 Ill. 17; *Hicks v. Stevens*, 131 Ill., p. 197; *Kennedy v. McKay*, 43 N. J. (L.) 288; *Redgrave v. Hurd*, 20 Ch. D. 1; *Newbigging v. Adam*, 34 Ch. D. 532; *Adam v. Newbigging*, 13 App. Cas. 308.

⁹ *Merwin v. Arbuckle*, 81 Ill. 501; *Johnson v. Beene*, 9 Ill. App. 64; *Holmes v. Ayer*, 110 Ill. 448; *Lord v. Goddard*, 13 How. 196; *Humphrey v. Merriam*, 32 Minn. 197; *Cowley v. Smith*, 46 N. J. (L.) 330.

ture it, if he is able to do so without unnecessary violence and without a breach of the peace.¹

D.

DURESS.

§ 253. **Duress Avoids Contract — Duress Defined.** — A contract is voidable at the option of the party if he entered into it under duress.² But an agreement entered into under duress like one entered into through fraud is voidable only at the election of the party intimidated, and if he afterwards affirm it is binding on him³ and it cannot be set up against an innocent purchaser without notice.⁴

Duress is of two kinds: (1) by actual imprisonment of the person, called duress of imprisonment or (2) by threats to imprison or do personal violence,⁵ called duress *per minas*. Imprisonment is the restraint of personal liberty whether in prison or elsewhere.

§ 254. **Legal Imprisonment Not Duress.** — To constitute duress by imprisonment the imprisonment must be illegal. Therefore a legal imprisonment is not duress;⁶ yet if an improper use is made of the process,⁷ or

¹ *Hodgden v. Hubbard*, 19 Vt. 504; 46 Am. Dec. 167.

² *Stouffer v. Latschaw*, 2 Watts, 167; 27 Am. Dec. 297; *Fisher v. Shattuck*, 17 Pick. 352; *Hackett v. King*, 6 Allen, 58; *Tapley v. Tapley*, 10 Minn. 448; 88 Am. Dec. 76; *Moore v. Adams*, 8 Ohio, 373; 32 Am. Dec. 733; *Brooks v. Berrymore*, 20 Ind. 97; *Foshey v. Ferguson*, 5 Hill, 158; *Richards v. Vanderpool*, 1 Daly, 71; *Strong v. Grannis*, 26 Barb. 123; *Taylor v. Cottrell*, 16 Ill. 98; *Richardson v. Duncan*, 3 N. H. 308; *Severance v. Kimball*, 8 N. H. 336; *Walbridge v. Arnold*, 21 Conn. 434; *Breck v. Arnold*, 21 Conn. 424; *Breck v. Blanchard*, 23 Conn. 303; *Shenk v. Phelps*, 6 Ill. (App.) 613.

³ *Worcester v. Eaton*, 13 Mass. 371; 7 Am. Dec. 155; *Bodine v. Morgan*, 37 N. J. (Eq.) 426; *Ormes v. Beadel*, 2 De. G. F. &

J. 333; *Bissell v. Bassett*, 1 H. & McH. 211.

⁴ *Deputy v. Stapleford*, 19 Cal. 302; *Fairbanks v. Snow*, 145 Mass. 153; 1 Am. St. Rep. 446. But see *Belote v. Henderson*, 5 Cold. 471; 98 Am. Dec. 433.

⁵ *Baker v. Morton*, 13 Wall. 158; *United States v. Huckabee*, 16 Wall. 461; *McCartney v. Wade*, 2 Helsk. 369; *Wilkerson v. Bishop*, 7 Cold. 24; *Wood v. Willis*, 33 Tex. 670; *Bane v. Detrick*, 52 Ill. 19; *Hullhorst v. Scharner*, 15 Neb. 57; *Guillaume v. Rowe*, 94 N. Y. 269; 46 Am. Rep. 141.

⁶ *Shepherd v. Wairous*, 3 Caines, 166; *Stouffer v. Latschaw*, 2 Watts. 167; 27 Am. Dec. 297; *Eddy v. Herrin*, 17 Me. 338; 35 Am. Dec. 261; *Alexander v. Pierce*, 10 N. H. 49; *Prichard v. Sheupe*, 51 Mich. 433.

⁷ *Meek v. Atkinson*, 1 Bailey, 84; 19 Am. Dec. 653.

although the imprisonment be legal, if the process was sued out maliciously and without probable cause, or with probable cause but for an unlawful purpose, the party imprisoned is under duress.¹ Thus it is an abuse of criminal process to resort² or threaten to resort³ to it for the purpose of coercing the payment of a private debt or demand. Nor will a threat of legal imprisonment—subject to the qualifications just given—amount to duress.⁴

§ 255. **Must be Personal — Duress of Goods.** — A promise is not voidable for duress which is made in consideration of the release of goods from detention.⁵ Duress of or menace to the person, it is said, is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert.⁶ This distinction is well settled in the common law, although there are cases in the American courts where the plea of duress of goods has been sustained.⁷

¹ *Baker v. Morton*, 13 Wall. 150; *Brown v. Pierce*, 7 Wall. 215; *Hatter v. Greenlee*, 1 Port. 222, 26 Am. Dec. 370; *Fay v. Oatley*, 6 Wis. 45; *Bane v. Detrick*, 52 Ill. 96; *Severance v. Kimball*, 8 N. H. 336; *Watkins v. Baird*, 6 Mass. 506; 4 Am. Dec. 170; *Strong v. Grannis*, 26 Barb. 122; *Bowker v. Lowell*, 49 Me. 429; *Work's Appeal*, 50 Pa. St. 444; *Taylor v. Cottrell*, 16 Ill. 98; *Phelps v. Zuchlag*, 34 Tex. 371.

² *Bane v. Detrick*, 52 Ill. 19; *Shenk v. Phelps*, 6 Ill. App. 612; *Richardson v. Duncan*, 3 N. H. 508; *Shaw v. Spooner*, 9 N. H. 197; *Hackett v. King*, 6 Allen, 58; *Seiber v. Price*, 26 Mich. 618; *Osborn v. Robbins*, 36 N. Y. 365.

³ *Harris v. Carmody*, 131 Mass. 51; *Town of Sharon v. Gager*, 46 Conn. 189;

Foley v. Greene, 14 R. I. 618; *First Nat. Bank v. Bryan*, 62 Iowa, 42; *Hullhorst v. Scharner*, 15 Neb. 57; *Schoener v. Lissauer*, 107 N. Y. 111.

⁴ *Hillborn v. Buchnam*, 78 Me. 462; 57 Am. Rep. 816; *Felton v. Gregory*, 130 Mass. 176; *Sieber v. Weiden*, 17 Neb. 582.

⁵ *Wilcox v. Howland*, 23 Pick. 167; *Bingham v. Sessions*, 14 Miss. 13; *Hazlerig v. Donaldson*, 2 Met. (Ky.) 445; *Edwards v. Handley*, *Hardin*, 603; 3 Am. Dec. 745; *Fleetwood v. New York*, 2 Sand. 475; *Seymour v. Prescott*, 69 Me. 376; *Heysham v. Dettre*, 89 Pa. St. 506.

⁶ *Skate v. Beale*, 11 Ad. & Ell. 990.

⁷ *Crawford v. Cato*, 22 Ga. 594; *Nelson v. Suddarth*, 1 Hen. & M. 350; *Foshay v. Ferguson*, 5 Hill, 158; *Collins v. Westbury*, 2 Bay, 211; 1 Am. Dec. 648; *Sagpor-*

But as we have seen, money paid for the release of goods from wrongful detention may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.¹

§ 256. **Extent of Duress.** — The duress which takes away free agency, and destroys the power of withholding assent to a contract, must amount to a constraint which is imminent and without immediate means of prevention, and such as would operate on a person of a reasonable firmness of purpose.² The threats must be such as to strike with fear a person of common firmness and constancy of mind. Duress by mere advice, direction, influence and persuasion is not legal duress.³ Thus a threat to withhold payment of a debt, or to refuse performance of a contract, or to do an injury which may be at once redressed by legal process, is not duress *per minas*; ⁴ nor a threat of an expensive lawsuit,⁵ or legal process,⁶ nor where a wife signed a mortgage from fear of threats to foreclose an existing mortgage and turn her out of her home.⁷

§ 257. **Who Must Impose Duress.** — The duress must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage, for duress by a third person will not avoid a contract made with a party who was not cognizant of it.⁸

§ 258. **Must Affect Promisor.** — A contract entered into in order to relieve a third person from duress is not void-

tas v. Jennings, 1 Bay, 470; Miller v. Miller, 68 Pa. St. 486; Spalds v. Barrett, 57 Ill. 289; 11 Am. Rep. 10; Williams v. Williams, 68 Md. 371; Thurman v. Burt, 53 Ill. 129.

¹ *Ante*, § 45.

² Miller v. Miller, 68 Pa. St. 486; Walloch v. Hoexter, 17 Abb. N. C. 26; French v. Shoemaker, 14 Wal. 332; Harmon v. Harmon, 61 Me. 237; Miller v. Miller, 68 Pa. St. 486; Bane v. Detrick, 52 Ill. 27.

³ Barrett v. French, 1 Conn. 354; 6 Am. Dec. 241.

⁴ Miller v. Miller, 68 Pa. St. 486.

⁵ Peckham v. Hendren, 76 Ind. 47.

⁶ Clafin v. McDonough, 33 Mo. 412; 84 Am. Dec. 54; Hunt v. Bass, 2 Dev. Eq. 292; 24 Am. Dec. 274; Tooker v. Sloan, 30 N. J. (Eq.) 394.

⁷ Buck v. Art, 35 Ind. 512.

⁸ Lawson Rights, Rem. & Pr., § 2367.

able on that ground.¹ The subject of the duress must be the contracting party himself,² or his wife, or her husband, parent, child,³ or near relative.⁴

E.

UNDUE INFLUENCE.

§ 259. What is "Undue Influence."—Fraud and Undue Influence are nearly allied, the latter being an extension made by equity of the former word as descriptive of an act of bad faith or deceit. Courts of equity looking beyond definite false and fraudulent statements, have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not in equity to bind him. The taking of such an unfair advantage is sometimes called Fraud; but it is more convenient, for the purpose of distinguishing it from the kind of Fraud with which we have already dealt, to call it the exercise of "Undue Influence."⁵

A contract may be avoided on the ground of undue influence when one of the parties has induced the other to enter into the contract by the unconscientious use of power afforded by

¹ *Lawson Rights*, Rem. & Pr., § 2267; *Plummer v. People*, 16 Ill. 358, 402; *Solinger v. Earle*, 82 N. Y. 393; *Spaulding v. Crawford*, 27 Tex. 188; *Oak v. Dustin*, 79 Me. 58; 1 Am. St. Rep. 281. *Contra*, *State v. Brantley*, 27 Ala. 44; *Fisher v. Shattuck*, 17 Pick. 252.

² Where a husband threatened that unless his wife signed his note as surety he would poison himself; this was held not duress. *Wright v. Remington*, 41 N. J. (L.) 48; 33 Am. Rep. 180.

³ *Wayne v. Sands*, 1 Freem. 350; Roll. Abr. 687; *Brooks v. Berryhill*, 20 Ind. 97; *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Dec. 396; *Solinger v. Earle*, 82 N. Y. 393; *McClintock v. Cummins*, 3 McLean, 158; *Simms v. Barefoot*, 2 Hayw. (Tenn.) 402; *Nat. Bank v. Kirk*, 90 Pa. St. 51; *Harrie v. Carmody*, 131 Mass. 51; 41 Am. Rep. 188;

Foley v. Greene, 14 R. I. 618; 51 Am. Rep. 419; *Kocourek v. Marak*, 54 Tex. 201; 38 Am. Rep. 623; *Haynes v. Rudd*, 30 Hun. 239; *McCoy v. Green*, 83 Mo. 676; *McGrory v. Reilly*, 14 Phila. 111; *Williams v. Walker*, 18 S. C. 577; *Nevada Bank v. Bryan*, 62 Iowa, 42. But see *Lefevre v. Dutruit*, 51 Wis. 326; 37 Am. Rep. 833; *Holt v. Agnew*, 67 Ala. 300; *Smith v. Rowley*, 66 Barb. 502.

⁴ In *Schultz v. Catlin*, 47 N. W. Rep. 946 (Wis.) threats made to a brother, and by him at plaintiff's request communicated to his sister in order to secure her signature to a note to compound the felony were held to constitute duress of the sister, for which she might avoid the note.

⁵ *Anson Contr.*, 165.

- (a) The family, fiduciary or confidential relations subsisting between them.
- (b) The mental weakness of the other, or
- (c) The necessities or extravagance of an expectant heir or one sustaining that character.

In these three cases the position of the parties raises a presumption of undue influence and the transaction will not be allowed to stand, unless the person claiming the benefit of it is able (and the burden is on him to do so) to repel the presumption by showing that it was in point of fact fair, just and reasonable.¹

(a) *Family or Confidential Relations.*

§ 260. **Introductory.**—The family or fiduciary or confidential relations which, existing between contracting parties, give rise to a presumption of undue influence are those of husband and wife, parent and child, guardian and ward, trustee and *cestui que trust*, attorney and client, priest and member of his flock, physician and patient and any other persons standing in similar relations.

§ 261. **Contracts between Husband and Wife.**—Husband and wife occupy towards each other a fiduciary relation of the most confidential character, which requires the utmost good faith between them, and a gift or conveyance from the wife to the husband is regarded with suspicion and to be supported must be free from fraud or undue influence.² In *Golding v. Golding*³ a husband who had

¹ *Smith v. Kay*, 7 H. L. Cas. 750; *Dent v. Bennett*, 4 Myl. & Cr. 269; *Woodbury v. Woodbury*, 141 Mass. 329; *Zeigler v. Hughes*, 55 Ill. 228; *Ward v. Armstrong*, 84 Ill. 151; *Sands v. Sands*, 113 Ill. 225; *Jones v. Lloyd*, 117 Ill. 597; *Cowee v. Cornell*, 75 N. Y. 99; *Fisher v. Bishop*, 108 N. Y. 25; *Greenfield's Estate*, 14 Pa. St. 489.

² *Swisshelm's Appeal*, 56 Pa. St. 475; 24 Am. Dec. 107; *Cruger v. Douglas*, 4 Edw. Ch. 433; *Boyd v. De la Montagne*,

73 N. Y. 496; 29 Am. Rep. 197; *In re Jones*, 6 Biss. 68; *Converse v. Converse*, 9 Rich. (Eq.) 535; *Stiles v. Stiles*, 14 Mich. 72; *Hollis v. Francols*, 5 Tex. 195; 51 Am. Dec. 760; *Wales v. Newbould*, 9 Mich. 45; *Meriam v. Harsen*, 4 Edw. Ch. 70; *Campbell's Appeal*, 80 Pa. St. 298; *Smylcy v. Reese*, 53 Ala. 89; 25 Am. Rep. 598; *Scarborough v. Watkins*, 9 B. Mon. 540; 50 Am. Dec. 529; *Darlington's Appeal*, 87 Pa. St. 510.

³ 82 Ky. 51.

but little money married a woman with nearly \$100,000 in real estate. He was a man of strong will and shortly after the marriage she conveyed to him through a trustee, one undivided half for his life, remainder to him in case of his surviving her and there being no issue. She subsequently obtained a divorce from him. It was held that he should be required to surrender the interest conveyed to him.

§ 262. **Parent and Child.** — Gifts and conveyances from a child to a parent are not favored.¹ While an adult child may make a binding transfer or conveyance of property to the parent, any such transfer by way of gift or improvident contract made just after attaining majority, or while in general under undue parental control and influence, will be jealously watched by courts of equity.² The same doctrine holds true of a transfer or conveyance to an adult child tainted with undue influence over an aged or infirm parent.³ All family arrangements of the filial kind, whether child or parent be the weaker party, should, in order to stand firmly, be free from fraud or undue influences on both sides, and made in good faith; or equity will readily set them aside.⁴ The rule extends to any person *in loco parentis*;⁵ to all cases in which one member of a family exercises a substantial preponderance in the family councils either from age or from character or from circumstances. In *Archer v. Hudson*,⁶ a young lady who had just attained her majority became security for her uncle to enable him to overdraw his account at his banker's. She was an

¹ Lawson Rights, Rem. & Fr., § 838; Taylor v. Taylor, 8 How. 183; Miskey's Appeal, 107 Pa. St. 611; Jennings v. Pye, 12 Pet. 211; Berkmeier v. Kellerman, 33 Ohio St. 239; Brown v. Burbank, 64 Cal. 99; Savery v. King, 35 E. L. & Eq. 100.

² Berger v. Udall, 31 Barb. 9.

³ Highberger v. Stiffler, 21 Md. 338; 83 Am. Dec. 593.

⁴ Schouler Dom. Relations, § 270;

Taylor v. Staples, 8 R. I. 170; Van Donge v. Van Donge, 23 Mich. 321; Rider v. Kelso, 53 Iowa 367; Miller v. Simonds, 72 Mo. 689; Jacox v. Jacox, 40 Mich. 473.

⁵ Archer v. Hudson, 7 Beav. 551; Brown v. Burbank, 64 Cal. 99; Berkmeier v. Kellerman, 33 Ohio St. 239; Highberger v. Stiffler, 21 Md. 338; Bowe v. Bowe, 42 Mich. 195.

⁶ 7 Beav. 560.

orphan, and had resided with her uncle for seven years previous to the transaction. The court, adverting to the fact that the security was obtained through the influence of a person standing *in loco parentis*, from the object of his protection and care, said, "This is a transaction which under ordinary circumstances this court will not allow."

§ 263. **Guardian and Ward.**—The same rule applies to transactions between guardian and ward.¹ While during the existence of the guardianship the relative situation of the parties imposes a general inability to deal with each other,² yet courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand even when they have occurred after the minority has ceased, and when the relation becomes thereby actually ended, if the intermediate period be short,³ unless the circumstances demonstrate the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian.⁴ A court of chancery will not permit one standing in the place of a guardian to place himself in an attitude of hostility to the interests of his wards, nor to derive any benefit to himself at their loss; and if a purchase by him of the property of the wards during the continuance of such relation can be permitted to stand under any circumstances, it will only be upon his showing clearly that he acted in the utmost good faith, that the price given was the full value, and that the transaction was for the benefit of the wards.⁵ The sale of property by a guardian to his ward may be disaffirmed by the ward after he comes of age. The ward may ignore the sale and recover

¹ Ashton v. Thompson, 32 Minn. 25; Wickiser v. Cook, 85 Ill. 68; Ward v. Pulsifer, 54 Vt. 45; Garvin v. Williams, 44 Mo. 466; 50 Mo. 206; Bridwell v. Swank, 20 Cent. L. J. 238; 84 Mo. 435; Hoppin v. Tobey, 9 R. I. 42; Malone v. Kelley, 54 Ala. 532; Ferguson v. Lowery, 54 Ala. 510; Meek v. Perry, 36 Miss. 190; Womach v. Austin, 18 C. 421.

² Snell's Equity, 402.

³ Waller v. Armistead, 2 Leigh, 11; 21 Am. Dec. 594; Wright v. Arnold, 14 B. Mon. 638; 61 Am. Dec. 172.

⁴ Hatch v. Hatch, 9 Ves. 287; Smith v. Dibrell, 31 Tex. 239; 96 Am. Dec. 526.

⁵ Mann v. McDonald, 10 Humph. 275.

the price and may also claim from his guardian interest upon the money thus invested.¹ And a gift to the guardian by the ward is voidable by the latter.²

It is said that a more stringent rule has been laid down as to guardians than applies to transactions between parent and child; for a guardian is not supposed to be influenced by that affection for his ward which parents entertain towards their own offspring and therefore has no such powerful check upon his selfish feelings.³

§ 264. *Trustee and Cestui Que Trust.*—As a general rule, a trustee will not be permitted to contract with or purchase the trust estate from his *cestui que trust*,⁴ for to sustain such a purchase, it must clearly appear that there has been no concealment in the matter, and that no advantage in any way has been taken by the trustee,⁵ and all presumptions are against its validity.⁶

§ 265. *Attorney and Client.*—While the relation of attorney and client continues, or even after it has been dissolved, purchases made by the attorney of the client are regarded with suspicion, and the attorney, if there are any circumstances of fraud, concealment or suspicion disclosed, will be held a trustee for the client of the property so purchased.⁷

§ 266. *Priest and Member of Flock.*—The power which a spiritual adviser may acquire over persons subject

¹ *Hendee v. Cleveland*, 54 Vt. 142.

² *Wade v. Pulsifer*, 54 Vt. 45.

³ *Schouler on Dom. Rel.*, § 387; *Pierce v. Waring*, 1 Ves. 380; *Hylton v. Hylton*, 2 Ves. 547; *Hatch v. Hatch*, 9 Ves. 286; *Hill on Trustees*, 187.

⁴ *Fox v. Mackreth*, 1 Lead. Cas. 123; *Jamison v. Glascock*, 29 Mo. 191; *Munro v. Allaire*, 3 Caines Cas. 183; 2 Am. Dec. 330; *McCants v. Bee*, 1 McCord Ch. 383; 16 Am. Dec. 610; *Everett v. Henry*, 67 Tex. 402.

⁵ *McCants v. Bee*, 1 McCord Ch. 383;

16 Am. Dec. 610; *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 251; *Bruch v. Lantz*, 2 Rawle, 392; 21 Am. Dec. 456; *Field v. Arrowsmith*, 3 Humph. 442; 39 Am. Dec. 185; *Juzan v. Toulmin*, 9 Ala. 683; 44 Am. Dec. 448; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Miggett's Appeal*, 109 Pa. St. 520; *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637; *Bryan v. Duncan*, 11 Ga. 67.

⁶ *Lathrop v. Pollard*, 6 Col. 424; *Beckett v. Tyler*, 3 McAr. 319.

⁷ *Lawson Rights, Rem. & Pr.*, § 145.

to his influence is also looked upon as raising the presumption of *mala fides*;¹ So the burden rests upon one claiming to be a spiritualistic medium to show that a contract made by him with one having implicit belief in the existence of the powers claimed by such medium was free from undue influence.²

§ 267. **Physician and Patient.** — So, it has been repeatedly declared that the relation of physician and patient is sufficient to avoid contracts made between them unless it is plain that the presumption of bad faith is repelled by the evidence.³

§ 268. **Other Cases.** — And the principle we are considering applies to every case where influence is acquired and abused or where confidence is reposed and betrayed. In *Smith v. Kay*,⁴ the defendant who was barely of age had incurred liabilities by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it could not be called parental, spiritual, or fiduciary, entitled him to the protection of the court. So where conveyances were made by a man to a woman with whom he was unlawfully cohabiting, it was held that the *onus* of showing an absence of undue influence was on her.⁵

§ 269. **How Long Disability Continues.** — Where a relation of confidence is once established it will not be considered as determined while the influence derived from it

¹ *Marx v. McGlynn*, 88 N. Y. 357; *Ford v. Hennessey*, 70 Mo. 580; *Caspari v. First German Church*, 12 Mo. App. 293.

² *Connor v. Stanley*, 72 Cal. 536; 1 Am. St. Rep. 84; *Thompson v. Hanks*, 14 Fed. Rep. 902.

³ *Dent v. Bennett*, 4 My. & Cr. 269; *Blackie v. Clark*, 15 Beav. 603; *Cadwalader v. West*, 48 Mo. 483; *Watson v.*

Mahan, 20 Ind. 297; *Audenreid's Appeal*, 89 Pa. St. 114; 33 Am. Rep. 731; *Woodbury v. Woodbury*, 141 Mass. 339; 55 Am. Rep. 479; *Doggett v. Lane*, 112 Mo. 215; *Crispell v. Dubois*, 4 Barb. 393.

⁴ 7 H. L. Cas. 730.

⁵ *Leighton v. Orr*, 44 Ia. 679; *Hanna v. Wilcox*, 53 Ia. 547; *Shipman v. Furniss*, 69 Ala. 555.

can be reasonably supposed to remain. Thus, the influence of a parent or guardian or one *in loco parentis* is presumed to continue for some time after the termination of the minority or dependence and until there is what may be called a complete emancipation, so that a judgment may be formed independent of any sort of control.¹ And this principle applies to every other relation of confidence.²

(b) *Mental Weakness.*

§ 270. **Rule in this Case Stated.** — Where the mind is enfeebled by old age, sickness, great distress, or other cause whereby it is rendered incapable of resisting undue pressure,³ in such case a contract made under such circumstances is made under Undue Influence, and will not be allowed to be taken advantage of by the other party.⁴ Thus it is held that equity will annul a contract for the purchase of land, entered into by an imbecile, without counsel, by which he agrees to pay twice the true value of the land, and is otherwise imposed upon by the representations of the vendor.⁵ At the same time mere mental weakness will not authorize a court of equity to set aside a contract, if such weakness does not amount to inability to comprehend the meaning and effect of the contract, and is unaccompanied by evidence of imposition or undue influence.⁶

On the same principle it is incumbent on a party dealing with an unlettered man, who can neither read nor write, to

¹ *Archer v. Hudson*, 7 Beav. 551; *Garvin v. Williams*, 44 Mo. 465; 50 Mo. 206; *Miller v. Simonds*, 73 Mo. 669; *Ashton v. Thompson*, 33 Minn. 25.

² *Mason v. Ring*, 3 Abb. App. Dec. 210; *Rhodes v. Bate*, L. R. 1 Ch. 253, 260; *Mitchell v. Homfray*, 8 Q. B. D. 587. *Henry v. Balman*, 35 Pa. St. 354.

³ *Allore v. Jewell*, 94 U. S. 506; *Griſſith v. Godey*, 113 U. S. 89; *Taylor v. Atwood*, 47 Conn. 498; *Moore v. Moore*, 58 Cal. 89; *Tracy v. Sockett*, 1 Ohio St. 54; *Scovel v. Barney*, 4 Oreg. 288; *Reed v. Peterson*, 91 Ill. 283; *Cadwallader v.*

West, 48 Mo. 483; *Harris v. Wamsley* 41 Ia. 671; *Perkins v. Scott*, 23 Ia. 237.

⁴ *Stewart v. Stewart*, 7 J. J. Marsh. 183; 23 Am. Dec. 396; *Bunch v. Hurst*, 3 Desaus. 273; 5 Am. Dec. 551; *Rau v. Von Zedlitz*, 133 Mass. 164; *Rider v. Miller*, 86 N. Y. 507; *Oard v. Oard*, 59 Ill. 46; *Varner v. Carson*, 59 Tex. 303; *Buffalow v. Buffalow*, 2 Dev. & B. Eq. 241.

⁵ *Garrow v. Brown, Winst. (Eq.)* 46; 86 Am. Dec. 450.

⁶ *Willemin v. Dunn*, 93 Ill. 511; *Kimball v. Cuddy*, 117 Ill. 213.

show that such person fully understood the object and import of the writings upon which he is proceeding to charge him.¹

(c) *Necessities of Party.*

§ 271. **Introductory.** — In the cases which fall under this division, as well as those under the last (b), the element of personal influence is not present, but they all possess these common features: the promisor incumbers himself with heavy liabilities for the sake of a small, or, at any rate, an inadequate present gain; and the promisee takes advantage either of the improvidence and moral weakness, or else of the ignorance and unprotected situation, of the promisor.²

§ 272. **Expectant Heirs.** — An expectant heir, in real or imaginary need of money and exposed to the temptation of raising it on his expectancy, is at such a disadvantage as to be peculiarly liable to imposition, and to require an extraordinary degree of protection.³ Therefore if a man takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for so much money as he has actually advanced, with the current rate of interest upon it.⁴ In *Butler v. Duncan*⁵ a dissolute spendthrift of twenty-five years of age gave a mortgage on all the real estate to which he was entitled as his father's heir, to a man who knew all about the circumstances, to secure the payment of an alleged loan of \$5,000 for which he gave his note, and which was made up of the following items: \$1,000 in cash; a

¹ *Selden v. Myers*, 20 How. 506; *Jones v. Austin*, 17 Neb. 498.

² *Anson Contr.* 168.

³ *Aylesford v. Morris*, L. R. 8 Ch. 484; *Boynton v. Hubbard*, 7 Mass. 112; *Jenkins v. Pye*, 12 Pet. 257; *Mastin v. Marlow*, 65 N. C. 685; *Bacon v. Bonham*,

33 N. J. (Eq.) 614; *Parsons v. Ely*, 45 Ill. 232; *Chesterfield v. Jannsen*, 1 Lead. Cas. in Eq. 590.

⁴ 1 Story Eq. 336; *Jenkins v. Pye*, 12 Pet. 241.

⁵ 47 Mich. 94.

former due bill for \$47, given up; \$199 interest credited on a previous mortgage; \$110.35 paid as premium upon an insurance policy assigned to the mortgagee; \$556.75 withheld by the latter to pay annual premiums thereafter as they shall fall due; and \$3,200 as the purchase price of 160 acres of land worth but little more than \$1,000, which the mortgagee required him to buy as a condition of lending him money, though he had no use for the land and knew nothing about its value. It was held an unconscionable transaction which a court of chancery could not sustain.

§ 273. **Reversionary Interests.** — The English court of chancery early adopted the rule that the purchaser of any reversionary interest might always be called upon to show that he had given full value for his bargain, so that he might not take advantage of a man's present necessities to deprive him of his future estate without reasonable return.¹ This rule, so far as it relates to vested interests, has been denied to be in force in the United States.² In Virginia it is held that mere inadequacy of consideration, unless it be so great as to shock the moral sense, is insufficient to avoid the sale of a reversionary interest.³ In *Parmelee v. Cameron*,⁴ the Court of Appeals of New York ruled that equity will not in the absence of fraud or undue influence, interfere to set aside a sale by a legatee of a legacy of a fixed and certain sum of money, payable at a fixed period after the death of the testator, with interest, although such sale was made some years before the legacy was due, and for an inadequate consideration; and although the legatee was at the time of the sale, a "reckless, dissipated, improvident and weak-minded young man," such a sale not being within the equity rule which enables the court to re-

¹ Anson Contr. 169.

² See *Oribbins v. Markwood*, 13 Gratt. 495, 499; *Mayo v. Carrington*, 19 Gratt. 74; *Davidson v. Little*, 23 Pa. St. 245; *Parmelee v. Cameron*, 41 N. Y. 392.

³ *Mayo v. Carrington*, *supra*, and see *Ruple v. Bindley*, 91 Pa. St. 236; *Bacon v. Bonham*, 33 N. J. Eq. 617; *Bunch v. Hurst*, 3 Dessau. 273; 5 Am. Dec. 551.

⁴ 41 N. Y. 392.

lieve expectant heirs, remainder-men and reversioners from disadvantageous bargains, where both the amount or value of the interest sold and the time of its enjoyment are uncertain.

§ 274. **Lender and Borrower.**—Agreements between lender and borrower are scrutinized by courts of equity, which refuse to enforce them, where to do so would be both unjust and unconscionable.¹ Thus in Rhode Island² relief was given in respect of a loan secured by mortgage and bearing interest at the rate of five per cent. per month in advance, the court finding, however, that the relation of the parties was such that the lender had upon him the duty of protecting the borrower. And on the sale by a mortgagor of his equity of redemption to the mortgagee, if the mortgagee take any undue advantage of the mortgagor, equity will compel him to redeed the property on receiving his debt and interest.³

§ 275. **Other Cases of Necessity.**—Other cases of the promisor's necessity may arise which would be difficult to classify, but which would clearly fall under the rule that a court of equity will inquire whether the parties meet on equal terms, and if it be found that the promisor was in distressed circumstances and under the control of the promisee, and that advantage was taken of his position, will avoid the contract,⁴ and that to sustain a contract in equity "a reasonable degree of equality between the contracting parties" is required.⁵ Thus where plaintiff had sold and transferred to the defendant a policy of insurance of \$1,477.73, which the insurance company was willing to pay if the plaintiff would place her signature to the release on

¹ *Dorrill v. Eaton*, 35 Mich. 302; *Butler v. Duncan*, 47 Mich. 94.

² *Brown v. Hall*, 28 Alb. L. J. 223.

³ *Bigelow on Fraud*, 259.

⁴ *Wood v. Abrey*, 3 Mad. 216; *Esham v. Lamar*, 10 B. Mon. 48; *Hough v. Hunt*,

2 Ohio, 495; *Lester v. Mahan*, 25 Ala. 445; *M'Cormick v. Malin*, 5 Blackf. 509; *M'Kinney v. Pinckard*, 2 Leigh, 149; *Wheeler v. Smith*, 9 How. 55.

⁵ *Longmate v. Ledger*, 2 Giff. 163.

the policy, and plaintiff taking advantage of her assignee's situation, exacted his promise to pay her \$477.73 for the mere inconvenience of writing her name, it was held that the promise was not binding and that plaintiff was entitled to recover only the fair value of her services in writing her signature, which was fixed by the court at one cent.¹

(d) *Consideration.*

§ 276. *Inadequacy of Consideration as Evidence of Fraud and Undue Influence.*— We have seen ² that courts of law, while requiring some consideration to support a contract, will not inquire into its adequacy. And it is well established that mere inadequacy of price is in itself of no more weight in equity than at law.³ It is evidence of fraud, but, standing alone, by no means conclusive evidence.⁴ Even when coupled with an incorrect statement of the consideration it will not alone be enough to vitiate a sale, in the absence of any fiduciary relation between the parties.⁵ But while mere inadequacy of consideration is insufficient evidence of fraud or undue influence, still where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount to proof of fraud.⁶ And where (as in the previous sections of this chapter) the party was not a free agent, the fact that the consideration was inadequate is a material element in determining the court to set the transaction aside.

¹ *Caplice v. Kelley*, 23 Kan. 474; 27 Kan. 359.

² *Ante*, § 98.

³ *Wood v. Abrey*, 3 Mad. 216; *Peacock v. Evans*, 16 Ves. 512; *Stillwell v. Wilkins*, Jac. 280; *Eyre v. Potter*, 15 How. 42; *Chaires v. Brady*, 10 Fla. 153; *Wintermute v. Snyder*, 2 Green Ch. 489; *Hemingway v. Coleman*, 49 Conn. 390.

⁴ *Cockell v. Taylor*, 15 Beav. 105; *Davieson v. Little*, 22 Pa. St. 245; *Talbot's Devisees v. Hooser*, 12 Bush, 408.

⁵ *Harrison v. Guest*, 6 D. M. G. 424; 8 H. L. 481.

⁶ 2 *Pomeroy on Eq. Juris*. 927; *Eyre v. Potter*, 15 How. 42; *Dunn v. Chambers*, 4 Barb. 376; *Parmelee v. Cameron*, 41 N. Y. 392; *Juzan v. Toulmin*, 9 Ala. 662; *Railroad Co. v. Commrs. of Miami Co.*, 12 Kan. 482; *Hyer v. Little*, 20 N. J. (Eq.) 442; *Coffee v. Ruffin*, 4 Cald. 487; *Howard v. Edgell*, 11 Vt. 9; *Steele v. Worthington*, 2 Ohio, 182; *Wiest v. Garman*, 3 Del. Ch. 422; 4 Houst. 119.

(e) *Remedies.*

§ 277. **Remedy of Party.**—The rules respecting the right to rescind contracts entered into under Undue Influence follow, so far as equity is concerned, the rules which apply to Fraud, but with one qualification. In the case of fraud, so soon as the fraud is discovered the parties are placed on equal terms, and an affirmation of the contract or laches in setting it aside binds the party who was originally defrauded. But in the case of undue influence it is not a particular statement, but a combination of circumstances which constitutes the vitiating element in the contract; and unless it is clear that the will of the injured party is relieved from the *dominant influence* under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, affirmation or laches will not be allowed to bind him.¹

¹ Anson Contr. 171; Moxon v. Payne, 8 Ch. 831; Savery v. King, H. L. Cas. 664; Montgomery v. Perkins, 116 Mass. 227; Butler v. Haskell, 4 Dess. 651; Boyd v. Hawkins, 3 Dev. (Eq.) 195; McCormick v.

Malin, 5 Blackf. 509; Thompson v. Lee, 31 Ala. 292; Wade v. Pulsifer, 51 Vt. 45; McClure v. Lewis, 72 Mo. 314; Rau v. Von Zedlitz, 132 Mass. 164.

CHAPTER VII.

THE LEGALITY OF THE AGREEMENT.

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§ 278. **Introductory.** — The law imposes certain limitations upon the freedom of contract by forbidding and refusing to enforce certain kinds of contracts. And the contracts which the law thus discourages and forbids are of three kinds, viz.: (a) contracts made in breach of a statute, (b) contracts made in breach of some rule of the common law; (c) contracts contrary to public policy. The three divisions will be treated in this chapter, and will be followed by a consideration of (d) the effect of such illegality upon contracts in which it is found to exist.

(a) *Contracts in Breach of Statute Law.*

§ 279. **Statutory Prohibition of Act.** — Where an act is expressly prohibited by statute, a contract to perform, or in the furtherance of, the prohibited act is illegal and unenforceable.¹ And the same rule obtains where the contract is in violation of a statute although not thereon expressly declared to be void.² And where a statute prohibits the making of contracts except in a certain manner, a contract made in a different manner is *ipso facto* void.³ Where a contract made in violation of a statute is void, the subsequent repeal of the statute does not make it valid.⁴

§ 280. **Statutes Imposing Penalty Simply.** — Where the statute does no more than impose a penalty upon the car-

¹ Mitchell v. Smith, 1 Binn. 110; 2 Am. Dec. 417; Seidenbender v. Charles, 4 Serg. & R. 151; 8 Am. Dec. 683; Bank v. Owens, 2 Pet. 527; Morton v. Fletcher, 2 A. K. Marsh. 187; 12 Am. Dec. 366; Gray v. Roberts, 2 A. K. Marsh. 208; 12 Am. Dec. 383; Johnson v. Cooper, 2 Yerg. 524; 24 Am. Dec. 503; Linn v. Bank, 2 Ill. 87; 25 Am. Dec. 71; Persons v. Jones, 12 Ga. 371; 53 Am. Dec. 477; Adams v. Hackett, 27 N. H. 289; 59 Am. Dec. 376; Woodworth v. Bennett, 43 N. Y. 273; 8 Am. Rep. 706; Walker v. Johnson, 7 Hill, 387; Buxton v. Hamblin, 32 Me. 448; Bell v. Quinn, 2 Sand. 146; Capehart v. Rankin, 3 W. Va. 571; 100 Am. Dec. 779; Jones v. Blackledge, 9

Kan. 563; 12 Am. Rep. 503; Foley v. Speir, 100 N. Y. 552; Levy v. Gowdy, 2 Allen, 320; Miller v. Post, 1 Allen, 434. So a contract in violation of the constitution of the United States, whether made by the United States, a State, or an individual, is invalid. Patton v. Gilmer, 42 Ala. 543; 94 Am. Dec. 635.

² Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699.

³ Ætna Ins. Co. v. Harvey, 11 Wis. 394.

⁴ Woods v. Armstrong, 54 Ala. 159; 25 Am. Rep. 671; Banchor v. Mansel, 47 Me. 58; Gilleland v. Phillips, 1 S. O. 182; Milne v. Huber, 3 McLean, 212. But see Curtis v. Leavitt, 15 N. Y. 85.

rying out of the objects of a contract, a question has arisen whether or not the penalty amounts to a prohibition. Some courts have ruled that if the object of the statute be solely to facilitate and secure the collection of the revenue, then the contract, though penalised, is not prohibited.¹ Other courts criticising this distinction as unsatisfactory, regard the question as one of legislative intent, and hold that "the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void or that it was not to be so."² And the weight of authority would seem to be that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, or in express words prohibit it.³ Thus where a statute imposed a penalty for the failure of a dealer in milk to have the measures used in the sale of milk sealed by the proper officer, it was held that this prohibited sales of milk in measures not sealed and the price

¹ *Brown v. Duncan*, 10 B. & C. 93; *Mandlebaum v. Gregovich*, 17 Nev. 95; *Lewis v. Welch*, 14 N. H. 298; *Corning v. Abbott*, 54 N. H. 471; *Rather v. First Nat. Bk.*, 93 Pa. St. 393; *Favor v. Philbrick*, 7 N. H. 340; *Larned v. Andrew*, 106 Mass. 435; *Lester v. Howard Bk.*, 33 Md. 559; 3 Am. Rep. 211; *Solomon v. Dreschler*, 4 Minn. 278; *Lindsley v. Rutherford*, 17 B. Mon. 245; *Babcock v. Goodrich*, 47 Cal. 509; *Strong v. Darling*, 9 Ohio, 201.

² *Harris v. Runnels*, 12 How. 70; *Pratt v. Stout*, 79 N. Y. 437; *Holt v. Green*, 78 Pa. St. 198; *Combs v. Emery*, 14 Me. 404; *Niemeyer v. Wright*, 75 Va. 239; 40 Am. Rep. 720; *Aiken v. Blaisdell*, 41 Vt. 655; *Pangborn v. Westlake*, 36 Ia. 549; *Griffett v. Wells*, 3 Denio. 227; *Dillon v. Allen*, 41 Ia. 227; *Ruchman v. Bergholz*, 37 N. J. (L.) 438.

³ *Durgin v. Dyer*, 63 Me. 143; *Doe v. Burnham*, 31 N. H. 426; *Pray v. Burbank*, 10 N. H. 378; *McConnell v. Kitchens*, 20 S. C. 490; *Bacon v. Lee*, 4 Ia. 490; *Kleckley v. Leyden*, 63 Ga. 215; *Thorne v. Traveler's Ins. Co.*, 80 Pa. St. 15; 21 Am. Rep. 89; *Pennington v. Townsend*,

7 Wend. 276; *Griffith v. Wells*, 3 Denio, 226; *Bank v. Owens*, 2 Pet. 527; *Carlton v. Witcher*, 6 N. H. 196; *Brackett v. Hoyt*, 29 N. H. 264; *Roby v. West*, 4 N. H. 285; 17 Am. Dec. 423; *Madison v. Ins. Co.*, 2 Ind. 483; *Hale v. Henderson*, 4 Humph. 199; *Territt v. Bartlett*, 21 Vt. 104; *Swords v. Owen*, 43 How. Pr. 176; *Hallett v. Norton*, 14 Johns. 273; *Ferdon v. Cunningham*, 20 How. Pr. 154; *Best v. Bander*, 29 How. Pr. 489; *Wheeler v. Russell*, 17 Mass. 258; *Russell v. Degrand*, 15 Mass. 35; *Ellsworth v. Mitchell*, 31 Me. 247; *Downing v. Ringer*, 7 Mo. 535; *Smith v. Albany*, 7 Lana. 14; *Hibernia Corp. v. Henderson*, 8 Serg. & R. 219; 11 Am. Dec. 593; *Sharp v. Teese*, 9 N. J. (L.) 352; 17 Am. Dec. 479; *O'Donnell v. Sweeney*, 5 Ala. 467; 39 Am. Dec. 337; *Columbia Bank v. Haldeman*, 7 Watts & S. 233; 42 Am. Dec. 239; *Harrison v. Berkley*, 1 Strob. 625; 47 Am. Dec. 578; *Milton v. Haden*, 32 Ala. 30; 70 Am. Dec. 523; *Wilson v. Spencer*, 1 Rand. 76; 10 Am. Dec. 491; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671; *Mitchell v. Smith*, 1 Binn. 110; 2 Am. Dec. 417.

of milk so sold could not be recovered,¹ as such a statute was plainly intended to protect the purchasers of milk; and where a statute imposes a penalty for retailing intoxicating liquors without a license, such sales are thereby prohibited, because the object of the statute is to diminish the evils of intemperance and not merely to secure a revenue.²

But the rule that a contract if prohibited by a penal statute is illegal and invalid, does not apply to the contract of marriage. For sound and obvious reasons the courts have declined to apply the rule to contracts of this character.³ Hence a marriage entered into without a license as required by statute,⁴ or without the consent of parents or guardians,⁵ is, nevertheless, valid, though the parties concerned may be punished by the infliction of the statutory penalties.⁶ Marriages, however, within the prohibited degrees of kindred and affinity, are contracts void because contrary to statute law,⁷ and an executory contract to marry would be likewise unenforceable made under similar conditions.⁸ Such prohibitions are not merely regulatory, but concern the form and the substance of the contract.⁹

§ 281. Illustrations of Contracts in Violation of Statutes. — Where an exemption is created by statute for the benefit of the family of the debtor, an executory contract by him to waive the provisions of the statute is inoperative and void.¹⁰ A person cannot hold himself out as a practi-

¹ *Miller v. Post*, 1 Allen, 434, 435.

² *Lewis v. Welch*, 14 N. H. 294; *Griffith v. Wells*, 3 Denio, 326.

³ *Hervey v. Moseley*, 7 Gray, 479; 66 Am. Dec. 515.

⁴ *Holmes v. Holmes*, 6 La. 463; 26 Am. Dec. 482; *Askew v. Dupree*, 30 Ga. 173; *White v. State*, 4 Ia. 449; *Cartwright v. McGown*, 121 Ill. 338; 2 Am. St. Rep. 105.

⁵ *Hiram v. Pierce*, 45 Me. 367; 71 Am. Dec. 555; *Teter v. Teter*, 101 Ind. 129; 51 Am. Rep. 742.

⁶ *Milford v. Worcester*, 7 Mass. 48.

⁷ See *Lawson Rights, Rem. & Pr.*, § 702, *et seq.*

⁸ *Campbell v. Crampton*, 18 Blatch. 150; 8 Abb. N. C. 363; *Paddock v. Robinson*, 63 Ill. 99; 14 Am. Rep. 112; *Haviland v. Halstead*, 34 N. Y. 643.

⁹ *Pollock Contr.* 250.

¹⁰ *Phelps v. Phelps*, 73 Ill. 545; 23 Am. Rep. 149; *Recht v. Kelly*, 83 Ill. 147; 25 Am. Rep. 301; *Curtis v. O'Brien*, 20 Ia. 576; 69 Am. Dec. 543; *Maxwell v. Reed*, 7 Wis. 533.

tioner of law without a license to do so issued by some competent authority — generally a court of justice of appellate or of original jurisdiction.¹ And, therefore, an unlicensed attorney cannot sue for his services for the reason that such services are performed in the face of a statute expressly or impliedly prohibiting them.² Where the obtaining of a diploma or license is a statutory requisite to the right of a person to practice medicine or surgery,³ one who performs such services without being so qualified cannot recover either on the implied contract to pay their value,⁴ or upon any express contract or any bill, note or other security given upon such a consideration.⁵

In *Dillon v. Allen*,⁶ a statute of Iowa enacted that if any person should run or knowingly permit his grain to be threshed by a machine, the rods, knuckle, joints or jacks of which were not boxed, he should be guilty of and punished for a misdemeanor. It was held that one who had threshed the grain of another under a contract, with a machine not so boxed, could not recover his compensation. So where a statute

¹ *Robb v. Smith*, 4 Ill. 46; *McKean v. Devries*, 3 Barb. 196; *Thorn v. Lawson*, 6 Tex. 240. In re Pratt, 13 How. Pr. 1.

² *Hittson v. Brown*, 3 Colo. 304; *Yates v. Robertson*, 80 Va. 475; *Hall v. Bishop*, 3 Daly, 109; *Harland v. Lilienthal*, 53 N. Y. 428; *Ames v. Gilman*, 10 Meto. 239.

³ The obtaining of a license issued by the State or by a qualified body is generally a requisite to the right of a physician to practice; and the legislature has power to regulate the practice of medicine and surgery, and to prescribe the qualifications for applicants for license. *Ex parte Spinney*, 10 Nev. 323; *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400; *State v. State Medical Board*, 33 Minn. 324; 50 Am. Rep. 575; *Logan v. State*, 5 Tex. App. 308; *Hewitt v. Chaner*, 16 Pick. 363; *Harding v. People*, 10 Col. 387; *Williams v. People*, 121 Ill. 731; *State v. Green*, 113 Ind. 462; *State v. Gregory*, 83 Mo. 123; 53 Am. Rep. 568; *Bibber v. Simpson*, 59 Me. 181; *Thompson v. Hazen*, 25 Me. 104; *Sheldon*

v. Clark, 1 Johns. 513; *Allcott v. Barber*, 1 Wend. 536; *Timmerman v. Morrison*, 14 Johns. 369; *Thompson v. Staats*, 15 Wend. 395; *Bailey v. Mogg*, 4 Denio, 60; *Finch v. Gridley*, 25 Wend. 469; *Antley v. State*, 6 Tex. App. 303; *Musser v. Chase*, 29 Ohio St. 577; *Wert v. Clutter*, 37 Ohio St. 347; *Fox v. Washington*, 2 Wash. 297.

⁴ *Richarson v. Dorman*, 28 Ala. 679; *Thompson v. Hazen*, 25 Me. 104; *Adams v. Stewart*, 5 Harr. (Del.) 144; *Bower v. Smith*, 8 Ga. 74; *Orr v. Meek*, 111 Ind. 40; *Smith v. Tracy*, 2 Hall, 465; *Jordan v. Dayton*, 4 Ohio, 294; *Dow v. Haley*, 30 N. J. (L.) 354; *Bailey v. Mogg*, 4 Denio, 60; *Downs v. Minchew*, 30 Ala. 86; *Smith v. Lane*, 24 Hun, 633; *Bibber v. Simpson*, 59 Me. 181; *Holmes v. Halde*, 74 Me. 38; 43 Am. Rep. 567; *McNamara v. Clintonville*, 63 Wis. 207; 51 Am. Rep. 722.

⁵ *Coyle v. Campbell*, 10 Ga. 570; *Holland v. Adams*, 31 Ala. 680.

⁶ 46 Ia. 299; 36 Am. Rep. 145.

provides that bricks shall be of a certain size and prohibits the making of any of a different size, a vendor of bricks of the latter size cannot recover their price; ¹ where a statute prohibits under a penalty the keeping of a nine-pin alley appurtenant to a tavern, a carpenter who builds one in such a place cannot recover for his labor.² And the same has been ruled in regard to a contract for the sale of fertilizers neither branded, tagged nor inspected as required by statute; ³ to a contract of service by a minor in violation of a statute prohibiting the employment of minors in manufactories; ⁴ to a contract to reprint a literary work in violation of a statutory copyright.⁵

§ 282. **Agreements in Fraud of Bankruptcy Laws.**—All agreements which operate in fraud of the bankruptcy laws are void,⁶ as for example an agreement by a creditor for a money consideration to withdraw his opposition to the bankrupt's discharge, or an agreement interfering with the equal distribution of the bankrupt's estate.⁷

§ 283. **Contracts for Usury.**—A contract for usury, *i. e.*, taking a higher rate of interest than the law allows, is one of the contracts prohibited by statute, since at common law parties may agree upon any rate of interest they please for the use of money, and in a number of the States any rate of interest may be contracted for, provided it is done in writing.⁸ But in others of the States it is unlawful to take or receive higher interest than what the statutes prescribe shall be legal interest. In Connecticut, Georgia, Indiana, Kansas, Kentucky, Maryland, Michigan, New Hampshire, Pennsylvania, Tennessee, and West Virginia, the creditor

¹ *Law v. Hodgson*, 3 Camp. 117.

² *Spurgeon v. McElwain*, 6 Ohio, 442; 27 Am. Dec. 266.

³ *Conley v. Sims*, 71 Ga. 171.

⁴ *Birkett v. Chatterton*, 13 R. I. 299; 43 Am. Rep. 80.

⁵ *Nichols v. Ruggles*, 3 Day, 145; 3 Am. Dec. 262.

⁶ *Re Gomersall*, L. R. 1 Ch. D. 137;

Hall v. Dyson, 17 Q. B. 785; *Rice v. Maxwell*, 13 S. & M. 289; 53 Am. Dec. 85; *Sharp v. Teese*, 9 N. J. (L.) 352; 17 Am. Dec. 479.

⁷ *Ex parte Mackay*, L. R. 3 Ch. 642.

⁸ See *Stimson Am. Stat. L.* 4812.

cannot recover more than the rate prescribed by law. In Alabama, the District of Columbia, Illinois, Iowa, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, South Carolina, Texas, Virginia, Wisconsin, the whole interest is forfeited. In Arkansas, Minnesota, New York, and Oregon, the contract on which the interest is given is made void, and in Oregon the entire debt is forfeited to the county school fund.¹ So if a charter of a corporation forbid it to take more than a certain rate of interest, the taking of a higher rate is usury, and the agreement unlawful.²

To constitute usury certain things must concur, viz. :—

(a) There must have been an intent on the part of debtor and creditor to give and take more for the use of the money than is allowed by law,³ so that if a contract be really usurious on account of some accident or mistake in calculation, it is not illegal.⁴

(b) A lending of money is also essential to work a violation of the statute,⁵ and hence on a loan of chattels any compensation agreed upon is legal; ⁶ on a sale of land or chattels the seller may ask more for time than for cash,⁷ and

¹ See *Stimson Am. Stat. L.* 4812.

² *Bank v. Swayne*, 8 Ohio, 257; 32 Am. Dec. 707; *Planters' Bank v. Sharp*, 4 Smedes & M. 75; 43 Am. Dec. 470; *Russell v. Fallor*, 1 Ohio St. 327; 59 Am. Dec. 631; *Hill v. Barre Bank*, 15 Fed. Rep. 432.

³ *Tyson v. Rickard*, 3 Har. & J. 109; 5 Am. Dec. 434; *Price v. Campbell*, 2 Call, 110; 1 Am. Dec. 535; *Bearce v. Barstow*, 9 Mass. 45; 5 Am. Dec. 25; *Shoop v. Clark*, 4 Abb. Dec. 235; *Condit v. Baldwin*, 21 N. Y. 219; 78 Am. Dec. 137; *Lloyd v. Scott*, 4 Pet. 205; *McFarland v. Bank*, 4 Ark. 44; 37 Am. Dec. 761; *United States Bank v. Waggener*, 9 Pet. 378; *Ely v. McClung*, 4 Port. 128; *Gregory v. Bewley*, 9 Ark. 22; *Smith v. Beach*, 3 Day, 268; *McGill v. Ware*, 5 Ill. 21; *Duncan v. Maryland, etc., Inst.*, 10 Gill & J. 299; *Howell v. Auten*, 2 N. J. (Eq.) 44; *Doak v. Snapp*, 1 Cold. 180; *Fay v. Lovejoy*, 20 Wis. 407; *Sizer v.*

Miller, 1 Hill, 227. *First Nat. Bank v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 478, holding that intent on the part of the lender alone is sufficient. And see *Sylvester v. Swan*, 5 Allen, 124; 81 Am. Dec. 734.

⁴ *Gibson v. Stearns*, 3 N. H. 185; *Lloyd v. Scott*, 4 Pet. 224; *N. Y. Fire Ins. Co. v. Parsons*, 2 Cow. 678; *Bevier v. Covell*, 87 N. Y. 50; *Marvine v. Hymers*, 12 N. Y. 233; *McElfetrick v. Hicks*, 21 Pa. St. 403.

⁵ *Tardeveau v. Smith*, Hard. 175; 8 Am. Dec. 727; *Foot v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205; *Spencer v. Tilden*, 5 Conn. 144; *Perrine v. Hotchkiss*, 2 Lans. 418.

⁶ *Bull v. Rice*, 5 N. Y. 315; *Hall v. Haggart*, 17 Wend. 280; *Cummings v. Williams*, 4 Wend. 678.

⁷ *Hogg v. Ruffner*, 1 Black, 115; *Brooks v. Avery*, 4 N. Y. 225; *Ball v. Rice*.

the sale of a promissory note or bill of exchange, after it is put in circulation, at a discount exceeding the legal rate of interest, is not usurious.¹

5 N. Y. 315; *Brown v. Gardner*, 4 Lea, 145; *Gilmore v. Ferguson*, 28 Ia. 220; *Graeme v. Adams*, 28 Gratt. 225; 14 Am. Rep. 180; *Gruell v. Smalley*, 1 Duv. 358.

¹ *Lloyd v. Keech*, 2 Conn. 175; 7 Am. Dec. 256; *Belden v. Lamb*, 17 Conn. 441; *Nichols v. Fearson*, 7 Pet. 103; Alabama, etc., Co. v. Hall, 58 Ala. 1; *Freeman v. Britten*, 17 N. J. (L.) 191; *Cram v. Hendricks*, 7 Wend. 569; *Munn v. Commission Co.*, 15 Johns. 44; 8 Am. Dec. 219; *Flemming v. Mulligan*, 2 McCord, 173; 13 Am. Dec. 707; *Ramsay v. Clark*, 4 Humph. 244; 40 Am. Dec. 645; *Holmes v. Williams*, 10 Paige, 326; 40 Am. Dec. 251; *Bailey v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385. In *Dickerman v. Day*, 31 Ia. 444; 7 Am. Rep. 156, the court say: "It is uniformly held that where a promissory note has been fairly made, and there is no usury between the original parties, so that the payee has acquired a legal right to sue the maker thereon, he may then dispose of it at any rate of discount from its face, and the purchaser will have a right to enforce its full payment against the maker. *Nichols v. Fearson*, 7 Pet. 103; *Powell v. Waters*, 8 Cow. 685; *Rice v. Mather*, 3 Wend. 62; *Cram v. Hendricks*, 7 Wend. 569; *Munn v. Commission Co.*, 15 Johns. 44; 8 Am. Dec. 219; *Rapelye v. Anderson*, 4 Hill, 472; *Holmes v. Williams*, 10 Paige, 326; 40 Am. Dec. 250; *Holford v. Blatchford*, 3 Sand. Ch. 149; *Churchill v. Suter*, 4 Mass. 162; *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256; *French v. Grindle*, 15 Me. 163; *Farmer v. Sewall*, 16 Me. 456; *May v. Campbell*, 7 Humph. 450; *Saltmarsh v. Planters' and Merchants' Bank of Mobile*, 17 Ala. 761. But in respect to an accommodation note sold or negotiated at a greater rate of discount than legal interest, the authorities are not uniform; some of the cases holding that the purchaser of such note from the payee, being the first party paying anything for it, is therefore the first owner, and that, as the payee before the sale of the note had not acquired a legal right to sue the accommodation maker, the purchaser must pay the full face of

the note, or the transaction will be usurious; that, as between the maker and the payee, the note is without consideration and void in the hands of the payee, and becomes valid only upon being negotiated to a bona fide purchaser, and hence a party who buys an accommodation note before it has been used for any business purpose, stands in the same situation, in respect to the defense of usury, as if he were the payee named therein, and this, though he had no knowledge that the note was accommodation paper, and supposing it to be business paper. The cases holding this view are as follows: *Aebey v. Rapelye*, 1 Hill, 10; *Holmes v. Williams*, 10 Paige, 326; 40 Am. Dec. 250; *Jones v. Hake*, 2 Johns. Cas. 60; *Wilkie v. Roosevelt*, 3 Johns. Cas. 66; *Munn v. Commission Co.*, 15 Johns. 44; *Powell v. Waters*, 17 Johns. 176; *Cram v. Hendricks*, 7 Wend. 569; *Dowe v. Schutt*, 2 Denio, 621; *Dix v. Van Wyck*, 2 Hill, 522; *Holford v. Blatchford*, 2 Sand. Ch. 149; *Knights v. Putnam*, 3 Pick. 184; *Churchill v. Suter*, 4 Mass. 156, 162; *Van Shaaek v. Stafford*, 12 Pick. 595; *Sauerwein v. Brunner*, 1 Har. & G. 474; *Metcalf v. Watkins*, 1 Port. 57; *Cockey v. Forest*, 3 Gill & J. 483; *Carlisle v. Hill*, 10 Ala. 396; *Williams v. Banks*, 11 Md. 196; *Corcoran v. Powers*, 6 Ohio St. 19; *Bosange v. Ross*, 29 Barb. 576; *Sylvester v. Swan*, 5 Allen, 134; 81 Am. Dec. 784; *Whitten v. Hayden*, 7 Allen, 407; *Catlin v. Gunter*, 11 N. Y. 368; 62 Am. Dec. 113; *Clark v. Sisson*, 22 N. Y. 312. On the other hand, the courts of many other of the States hold that the defense of usury cannot be set up against the purchaser of an accommodation note taken at a greater rate of discount than legal interest, unless such purchaser have knowledge of the character of the paper. The cases holding this view are the following: *Otto v. Durego*, 14 Wis. 571; *Whitworth v. Adams*, 5 Rand. 333; *Taylor v. Bruce*, *Gilmer*, 42; *Jackson v. Fassitt*, 23 Barb. 645; *Sherman v. Blackman*, 24 Ill. 347; *Byrne v. Grayson*, 15 La. Ann. 457; *Smith v. Beach*, 3 Day, 268;

(c) It has been held not usurious to take a higher rate of interest than allowed by law when the contract or security is peculiarly hazardous or the contingency uncertain,¹ nor to agree to pay a sum as a penalty if the debt is not paid at maturity,² nor to agree to pay the attorney's fee if the debt has to be collected by suit,³ nor to take the highest legal interest out of the note in advance,⁴ nor to charge compound interest.⁵

(d) A broker's commission on the money loaned, in addition to the legal interest, is not usurious, provided it is a *bona fide* charge for extra trouble and expense.⁶ This principle

Middletown Bank v. Jerome, 18 Conn. 448; Humphrey v. Clark, 27 Conn. 381; Gaul v. Willis, 26 Pa. St. 257; 4 Am. Law Rev. 5581; Ramsey v. Clark, 4 Humph. 244. In our opinion, this latter view is the more reasonable and just, and more in harmony with well-settled principles."

¹ Lloyd v. Scott, 4 Pat. 205; Wilson v. Kilburn, 1 J. J. Marsh. 494; Truby v. Musgrove, 118 Pa. St. 89; 4 Am. St. Rep. 575; Spencer v. Tilden, 5 Cow. 114; Thorndike v. Stone, 11 Pick. 183; Com. Bk. v. Nolan, 8 Mass. 508; Morrison v. McKinnon, 12 Fla. 552. But the ordinary risk of the death or insolvency of the borrower is not such a hazard. Colton v. Dunham, 2 Page, 267.

² Righter v. Warehouse Co., 99 Pa. St. 289; Fisher v. Anderson, 25 Ia. 28; 95 Am. Dec. 761; Tardeveau v. Smith, Hardin, 175; 3 Am. Dec. 737; Downey v. Beach, 78 Ill. 33; Ramsay v. Morrison, 39 N. J. (L.) 591; McNairy v. Bell, 1 Yerg. 502; 24 Am. Dec. 454; Gambrell v. Rose, 8 Blackf. 140; 44 Am. Dec. 760; Gruell v. Smalley, 1 Duvall, 558; Gower v. Carter, 3 Iowa, 244; 68 Am. Dec. 71; Davis v. Rider, 53 Ill. 416; Conrad v. Gibbon, 29 Ia. 120; Horn v. Nash, 1 Ia. 204; 63 Am. Dec. 437; Rogers v. Sample, 33 Miss. 310; 69 Am. Dec. 368; Walker v. Abt, 83 Ill. 236; Hackenberry v. Shaw, 11 Ind. 392.

³ First Nat. Bk. v. Canetsey, 34 Ind. 149; Smith v. Silvers, 32 Ind. 321; Weatherly v. Smith, 40 Ia. 131; 6 Am. Rep. 663; Miner v. Bank, 53 Tex. 559.

⁴ English v. Smock, 34 Ind. 115; 7 Am.

Rep. 215; Bank v. Smoot, 2 McAr. 371; Parker v. Cousins, 2 Gratt. 372; 44 Am. Dec. 388; Meyer v. Muscatine, 1 Wall. 384; Newall v. Bank, 12 Bush, 57; Goodrich v. Reynolds, 31 Ill. 490; 83 Am. Dec. 240; Hawks v. Weaver, 48 Barb. 164; Brown v. Vandyke, 8 N. J. (Eq.) 795; 55 Am. Dec. 250; Magruder v. Bank, 18 Ark. 9.

⁵ Culver v. Bigelow, 43 Vt. 249; Miner v. Bank, 53 Tex. 559; Woods v. Rankin, 2 Heisk. 46; Comm'rs. v. King, 13 Fla. 461; Austin v. Bacon, 28 Wis. 416; Brown v. Vandyke, 8 N. J. (Eq.) 795; 55 Am. Dec. 250; Stewart v. Petree, 55 N. H. 621; 14 Am. Rep. 353; Hale v. Hale, 1 Cold. 233; 78 Am. Dec. 491; Fitzhugh v. McPherson, 3 Gill. 408; Quimby v. Cook, 10 Allen, 32; Tylee v. Yates, 3 Barb. 232; Fobes v. Cantfield, 3 Ohio, 18; Sinclair v. Peebles, 3 Cold. 584. *Contra*, Kimbrough v. Lukins, 70 Ind. 373; Cox v. Brookshire, 76 N. C. 314; Mason v. Callender, 3 Minn. 550; 73 Am. Dec. 102. In some States an agreement for interest upon interest is held to be void as against public policy. Hastings v. Wiswall, 8 Mass. 455; Barrell v. Joy, 16 Mass. 237; Wilcox v. Howland, 23 Pick. 167; Henry v. Flagg, 13 Met. 64; Newell v. Houlton, 22 Minn. 19; White v. Illus, 54 Minn. 43; Cox v. Smith, 1 Nev. 161; 90 Am. Dec. 476.

⁶ Suydam v. Westfall, 4 Hill, 211; Hall v. Daggett, 6 Cow. 653; Nourse v. Prime, 7 Johns. Oh. 69; 11 Am. Dec. 403; Boardman v. Taylor, 66 Ga. 638; Eddy v. Badger, 8 Bias. 238; Matthews v. Coe, 70 N. Y. 239; 26 Am. Rep. 583; Cockle v. Flack, 92

covers, according to some of the authorities, any *bona fide* service or expense rendered or incurred by the lender himself,¹ while according to others, if the lender exact a bonus from the borrower in addition to legal interest, the transaction is usurious.² And by the weight of authority, if a bonus is charged by the agent, or he otherwise extorts an illegal commission from the borrower without the knowledge of the principal, the latter is not affected by the agent's illegal act.³

In some States it is held that if negotiable paper be given on a usurious contract, it is void in the hands even of an innocent holder for value,⁴ while in others, the defense of usury cannot be set up as against a *bona fide* holder for value.⁵

§ 284. **Wagering Contracts.** — A wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either a present payment or transfer by the

U. S. 844; *White v. Dwyer*, 31 N. J. (Eq.) 40; *Morton v. Thurber*, 85 N. Y. 550; *Smith v. Price*, 2 Heisk. 293. *Contra*, *Haven v. Hudson*, 12 La. Ann. 660; *Stark v. Sperry*, 6 Lea, 411; 40 Am. Rep. 47.

¹ *Van Tassell v. Wood*, 12 Hun, 383; *Dayton v. Moore*, 30 N. J. (Eq.) 543; *Morton v. Thurber*, 85 N. Y. 550; *Atlanta, etc., Mining Co. v. Gwyer*, 48 Ga. 11; *Eaton v. Alger*, 2 Abb. App. 5; *Eldridge v. Reed*, 2 Sweeny, 155; *Cockle v. Flack*, 93 U. S. 344; *Trotter v. Curtis*, 19 Johns. 160; 10 Am. Dec. 211; *Thurston v. Corne*, 33 N. Y. 281; *Hall v. Daggett*, 6 Cow. 613; *De Forest v. Strong*, 8 Conn. 513; *Hargar v. McCulloch*, 2 Denio, 119; *Matthews v. Coe*, 70 N. Y. 239; 26 Am. Rep. 582.

² *Walter v. Fouts*, 52 Md. 147; *Andrews v. Poe*, 30 Md. 485; *Fanning v. Dunham*, 5 Johns. Ch. 122; 9 Am. Dec. 283; *Hewitt v. Dement*, 57 Ill. 500; *Harris v. Wicks*, 28 Wis. 198; *Haven v. Hudson*, 12 La. Ann. 660; *Rowland v. Bull*, 5 B. Mon. 146; *Stark v. Sperry*, 6 Lea, 411; 40 Am. Dec. 47.

³ *Esteves v. Purdy*, 66 N. Y. 446; *Con-*

dit v. Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Conover v. Van Meter*, 18 N. J. (Eq.) 151; *Moore v. Bogart*, 19 Hun, 237; *Manning v. Young*, 28 N. J. (Eq.) 868; *Acheson v. Chase*, 23 Minn. 211; *Muir v. Savings Inst.*, 16 N. J. (Eq.) 537; *Gokey v. Knapp*, 44 Iowa, 33; *Van Wyck v. Watters*, 81 N. Y. 352; *Balinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69; *Boylston v. Bain*, 90 Ill. 285; *Crane v. Hubel*, 7 Paige, 418; *Boardman v. Taylor*, 66 Ga. 638; *Brigham v. Myers*, 51 Iowa, 397; 33 Am. Rep. 140. *Contra*, *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 Neb. 231; 25 Am. Rep. 487; *Cheney v. Eberhart*, 8 Neb. 423.

⁴ *Wilkie v. Roosevelt*, 3 Johns. Cas. 206; 2 Am. Dec. 149; *King v. Johnson*, 3 McCord, 365; *Churchill v. Suter*, 4 Mass. 156; *Young v. Berkley*, 2 N. H. 410; *Powell v. Waters*, 8 Cow. 669; *Solomons v. Jones*, 3 Brev. 54; 5 Am. Dec. 533.

⁵ *Creed v. Stevens*, 4 Whart. 223; *Wendlebone v. Parks*, 18 Iowa, 546; *Otto v. Dingge*, 14 Wis. 571.

other party, or a promise to pay or transfer upon the event determining in a particular way.¹ Now there are wagers or wagering contracts, — like contracts of insurance, — which are permitted by law and there are wagers which are not permitted by law and which are commonly spoken of as mere bets. Nevertheless at common law wagers of the latter kind were enforceable, though discouraged by the courts which, at last, finding that frivolous and sometimes indecent matters were brought before them for decision, established the rule that wagers would not be enforced where they were against public policy,² or were indecent,³ or tended to injure the feelings of third parties.⁴

¹ *Anson Contr.*, § 174; *Leake Contr.*, § 748.

² On this ground the following wagers have been declared void at common law: That one of the parties would not marry (because contracts in restraint of marriage are void). *Hartley v. Rice*, 10 East. 22. That a certain bird will win a cock fight (because it encourages cruelty). *Brogden v. Marriott*, 3 Bing. N. C. 88. As to the future amount of the hop duty (because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters). *Atherford v. Beard*, 3 Term Rep. 610. As to the duration of the life of Napoleon Bonaparte (because it gave one party an interest in keeping the king's enemy alive, and the other an interest in compassing his death by unlawful means) *Gilbert v. Sykes*, 16 East. 150. As to whether a prisoner will be convicted on a criminal charge (because it gives one of the parties an interest in obstructing or corrupting the fountains of justice). *Evans v. Jones*, 5 Me. & W. 77. As to the result of an election (because it gives each party an interest in corrupting the vote or falsifying the count). *Bunn v. Riker*, 4 Johns. 426; 4 Am. Dec. 292; *Vischer v. Yates*, 11 Johns. 21; *Rust v. Got*, 9 Cow. 169; 18 Am. Dec. 497; *Hill v. Kidd*, 43 Cal. 615.

³ Thus a wager as to whether a certain person is a man or a woman (*DaCosta v. Jones*, 2 Comp. 739); or as

to whether an unmarried woman will have a child by a certain day (*Ditchburn v. Goldsmith*, 4 Camp. 152) is void.

⁴ As said in *Good v. Elliot*, 3 T. R. 698, a wager that a young lady who passes for twenty three years of age is really thirty-three or that she squints, or has a mole on her breast, would be void. In a later English case A and B, two rival coach drivers, each bet the other his watch that Col. R. would go by his coach to an entertainment that evening. On an action being brought for the stake, Abbott, J., at the beginning of the argument, said: "I doubt whether this wager be legal. The effect of it would be to subject a third party to great inconvenience by exposing him to the importunities of the proprietors of those vehicles; any person who has walked through Piccadilly must be sensible that this is no small inconvenience." When the case came to a decision all the judges were of the same opinion. "A wager like the present," said Lord Ellenborough, "that a gentleman should go by one of these conveyances rather than another, the decision of which would expose him to improper importunity and interruptions and would abridge the exercise of his right of electing his own conveyance, certainly exposes him to some inconvenience. What has been said of the inconvenience subsisting in Piccadilly is applicable to this case and arises from the same circumstances. This wager then being pregnant with

In other cases wagers were not illegal either in England or America,¹ and we find wagers that a certain person was the owner of a certain piece of property;² that the world is not round;³ that a railroad would or would not be finished to a certain place by a certain time,⁴ as to the weight of a dressed hog;⁵ as to the result of a presidential election in another State made after the vote was cast,⁶ recognized as valid contracts by the courts. But the descendants of the Puritan settlers of the New England States took a different view of the matter, and hence we find that in those States at least, and in some others, all wager contracts without exception are held to be illegal.⁷ And in most, if not all, of the States, wagers are now prohibited by statute, and by those statutes what is and what is not a wagering contract must be determined.⁸

§ 285. *Contracts of Marine Insurance.* — A wager may be made upon a pure gaming or sporting transaction, or it may be directed to commercial objects, and of the latter kind is a contract of marine insurance where the owner of a cargo or a ship agrees to pay an underwriter a certain sum in

these consequences to other parties, seems to me to be illegal." *Eltham v. Kingsman*, 1 Barn. & Ald. 683.

¹ *Dewes v. Miller*, 5 Harr. (Del.) 247; *Trenton, etc., Ins. Co. v. Johnson*, 24 N. J. (L.) 583; *Kirkland v. Randon*, 8 Tex. 10; 58 Am. Dec. 94; *Wheeler v. Friend*, 23 Tex. 633; *Stoddard v. Martin*, 1 R. I. 1; 19 Am. Dec. 643; *Dunman v. Strother*, 1 Tex. 89; 46 Am. Dec. 97; *Campbell v. Richardson*, 10 Johns. 406; *Johnson v. Russell*, 37 Cal. 670; *Winchester v. Nutter*, 52 N. H. 507; 13 Am. Rep. 93; *Wheeler v. Spencer*, 15 Conn. 23; *Bailes v. Williamson*, 15 Tex. 318; *Haskett v. Wootan*, 1 N. & Mc. 120.

² *Good v. Elliot*, 3 Term. Rep. 693.

³ *Hampden v. Walsh*, L. R. 1 Q. B. D. 192.

⁴ *Johnson v. Fall*, 6 Cal. 359; 65 Am. Dec. 518; *Beadles v. Bless*, 27 Ill. 330; 81 Am. Dec. 231.

⁵ *Mulford v. Bowen*, 9 N. J. (L.) 315.

⁶ *Smith v. Smith*, 21 Ill. 244; 74 Am. Dec. 100.

⁷ *Amory v. Gilman*, 2 Mass. 1; *Love v. Harvey*, 114 Mass. 82; *Perkins v. Eaton*, 3 N. & L. 152; *Wheeler v. Spencer*, 15 Conn. 30; *Eldred v. Molley*, 2 Colo. 320; *Winchester v. Nutter*, 52 N. H. 507; 13 Am. Rep. 93; *Rice v. Gist*, 1 Strob. 63; *Harding v. Walker*, 1 Hemp. 53; *Thomas v. Cronise*, 16 Ohio, 54; *Lewis v. Littlefield*, 15 Mo. 233; *West v. Holmes*, 26 Vt. 530; *Wilkinson v. Tousley*, 16 Minn. 299; 10 Am. Rep. 139; *Edgell v. McLaughlin*, 6 Whart. 176; *Holt v. Hodge*, 6 N. H. 104; 25 Am. Dec. 451; *Monroe v. Smelly*, 23 Tex. 586; 78 Am. Dec. 541; *Lucas v. Harper*, 24 Ohio St. 323.

⁸ See 1 *Stimson Stat. Law*. As to recovery of money in the hands of stakeholders or money lost in gaming, see *ante*, § 54.

consideration of the latter paying him a larger sum if his cargo or his ship is lost by certain specified perils of the sea. The law forbids a person to make such a contract unless he has what is called "an insurable interest" in the vessel or the cargo, and contracts in breach of this rule are mere wagers, even at common law, for the interest which such a person would have in wrecking the vessel or employing some one to wreck it, made, in the eyes of the courts, such a wager one against public policy.

But any interest either legal or equitable is a sufficient "interest" within this rule;¹ and so the interest of the owner of a chartered ship;² or of a charterer of a ship;³ or of the owner of a ship hypothecated by bottomry;⁴ or of a lender on a bottomry bond;⁵ or of the owner in the freight which would have been carried but for the loss;⁶ or of a person who has made an oral contract to purchase a ship;⁷ or of a commission merchant to whom a cargo is consigned for sale;⁸ or of a lienor;⁹ or in profits on goods shipped;¹⁰ or of a mortgagor of a vessel;¹¹ or of a mortgagee;¹² or of a part owner;¹³ or of the master;¹⁴ or of one who has spent money on the ship for repairs;¹⁵ or of a vendee of a vessel

¹ *Buck v. Chesapeake Ins. Co.*, 1 Pet. 163; *Oliver v. Greene*, 3 Mass. 183; 3 Am. Dec. 96; *Locke v. North Am. Ins. Co.*, 13 Mass. 61.

² *Barber on Ins.* 94.

³ *Bartlet v. Walter*, 13 Mass. 267; 7 Am. Dec. 143.

⁴ *Kenny v. Clarkson*, 1 Johns. 385; 3 Am. Dec. 334.

⁵ *Glover v. Black*, 3 Burr. 1394; *Mac-kensie v. Whitworth*, L. R. 10 Ex. 142; 1 Ex. Div. 36; *Robertson v. United Ins. Co.*, 2 Johns. Cas. 250; 1 Am. Dec. 166; *Jennings v. Ins. Co.*, 4 Binn. 244, 251; 5 Am. Dec. 404. And see *Ins. Co. v. Gosaler*, 96 U. S. 645.

⁶ *Thompson v. Taylor*, 6 Term Rep. 478; *Adams v. Ins. Co.*, 23 Pick. 163; 1 *Arnould on Insurance*, 202.

⁷ *Arnewick v. Ins. Co.*, 129 Mass. 185.

⁸ *Putnam v. Ins. Co.*, 5 Met. 392; *Holbrook v. Brown*, 2 Mass. 280.

⁹ *Russell v. Ins. Co.*, 1 Wash. 409; *Seamans v. Loring*, 1 Mason, 137.

¹⁰ *Abbott v. Sebor*, 3 Johns. Cas. 39; 2 Am. Dec. 129; *Fosdick v. Ins. Co.*, 3 Day, 108; *French v. Ins. Co.*, 16 Pick. 397; *Locke v. Ins. Co.*, 13 Mass. 61.

¹¹ *Strong v. Ins. Co.*, 10 Pick. 40; 20 Am. Dec. 507; *Curry v. Ins. Co.*, 10 Pick. 535; *Higginson v. Dall*, 13 Mass. 96; *Wilke v. Ins. Co.*, 19 N. Y. 184.

¹² *Clark v. Ins. Co.*, 100 Mass. 509; 1 Am. Rep. 185.

¹³ *Bulkley v. Fishing Co.*, 1 Conn. 571; *Oliver v. Greene*, 3 Mass. 183; 3 Am. Dec. 97; *Knight v. Ins. Co.*, 26 Ohio St. 664; 20 Am. Rep. 778.

¹⁴ *Buck v. Ins. Co.*, 1 Pet. 163; *Holbrook v. Brown*, 2 Mass. 280.

¹⁵ *Buchanan v. Ins. Co.*, 6 Cow. 319.

who has made part payment;¹ have all been held to show a sufficient interest to prevent the contract from being a wagering contract. An insurance for whom it may concern is limited to those who have an insurable interest, who may be lawfully insured, and for whom it was intended under their prior authorization or subsequent adoption.²

§ 286. **Contracts of Fire Insurance.** — A contract of fire insurance when the insurer has no interest in the property insured is for the same reason given in the last section a mere wager and unenforceable.³ As to what is a sufficient interest, it seems that whoever has such a claim on the property that if without insurance a loss would fall on him if it were destroyed by fire has an insurable interest.⁴

§ 287. **Contracts of Life Insurance.** — A contract of life insurance is plainly a wager, and the danger of permitting

¹ *Bilder v. Ins. Co.*, 20 Pick. 259; *Kenny v. Clarkson*, 1 Johns. 335.

² *Frierson v. Brenham*, 5 La. Ann. 540; 52 Am. Dec. 603; *Haynes v. Rowe*, 40 Me. 181; *Augusta Ins., etc., Co. v. Abbott*, 12 Md. 343.

³ *Atwell v. Miller*, 11 Md. 343; 69 Am. Dec. 206; *Sweeney v. Ins. Co.*, 20 Pa. St. 337; *Agricultural Ins. Co. v. Montague*, 38 Mich. 543; 31 Am. Rep. 326; *Randall v. Ins. Co.*, 81 Me. 373; *Fowler v. Ins. Co.*, 26 N.Y. 422; *Bersch v. Ins. Co.*, 28 Ind. 64.

⁴ *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; 25 Am. Rep. 386; *Carpenter v. Ins. Co.*, 16 Pet. 473; *Addison v. Ins. Co.*, 7 B. Mon. 470; *Keller v. Ins. Co.*, 7 La. 29; *Traders' Ins. Co. v. Robert*, 9 Wend. 404; *Foster v. Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544; *Fox v. Ins. Co.*, 52 Me. 533; *Haley v. Ins. Co.*, 120 Mass. 292; *Phelps v. Ins. Co.*, 9 Bosw. 404; *Herkimer v. Rice*, 27 N. Y. 163; *Ins. Co. v. Chase*, 5 Wall. 509; *Babson v. Ins. Co.*, 4 Ins. Law. J. 50; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; 10 Pet. 510; *Herkimer v. Rice*, 27 N. Y. 163; *White v. Madison*, 26 N. Y. 117; *Stockdale v. Dunlop*, 6 Mees. & W. 224; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411; *Eastern R. R. Co. v. Ins. Co.*, 98

Mass. 420; *Ins. Co. v. Chase*, 5 Wall. 512; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 303; 25 Am. Rep. 386; *Rockford Ins. Co. v. Nelson*, 65 Ill. 419; *Merrett v. Ins. Co.*, 42 Iowa, 13; *Williams v. Ins. Co.*, 107 Mass. 379; 9 Am. Rep. 41; *Herkimer v. Rice*, 27 N. Y. 163; *McDonald v. Black*, 20 Ohio, 185; 55 Am. Dec. 443; *Warren v. Ins. Co.*, 31 Iowa, 464; 7 Am. Rep. 160; *Agricultural Ins. Co. v. Clancey*, 9 Ill. App. 137; *Buffalo Steam Works v. Ins. Co.*, 17 N. Y. 401; *Strong v. Ins. Co.*, 10 Pick. 40; 20 Am. Dec. 507; *Ramsay v. Phoenix Ins. Co.*, 2 Fed. Rep. 429; *Tuckerman v. Ins. Co.*, 9 B. I. 414; *Franklin Ins. Co. v. Martin*, 40 N. J. (L.) 568; 29 Am. Rep. 271; *Ayres v. Ins. Co.* 17 Iowa, 176; *Smith v. Ins. Co.*, 6 Cush. 443; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Southern Ins. Co. v. Lewis*, 42 Ga. 567; *Tyler v. Ins. Co.*, 16 Wend. 385; *Gilman v. Ins. Co.*, 81 Me. 488; *Bell v. Ins. Co.*, 5 Rob. (La.) 423; *Nible v. Ins. Co.*, 1 Sand. 551; *Fletcher v. Ins. Co.*, 18 Pick. 419; *Laurent v. Ins. Co.*, 1 Hall, 41; *Franklin Ins. Co. v. Drake*, 2 B. Mon. 47; *Harris v. Ins. Co.*, 50 Pa. St. 341; *Abbott v. Ins. Co.*, 30 Me. 414; *Curry v. Ins. Co.*, 10 Pick. 535; 20 Am. Dec. 547.

such an inducement to the commission of a crime as would result from A being allowed by paying a small sum of money to obtain a large sum on the death of B has established the rule that such contracts are invalid unless A can show a reasonable ground, founded in the relations of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance of the life of B.¹ "All which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend upon the life of another."²

Under this rule so far as pecuniary interest is concerned a creditor has an insurable interest in the life of his debtor;³ an annuitant in the life on which the annuity depends;⁴ a master in the life of his servant;⁵ a partner in the life of his partner;⁶ a servant in the life of a master;⁷ a manager in the life of an actor engaged by him.⁸ A person who

¹ United Brethren Mut. Aid Soc. v. McDonald, 123 Pa. St. 324; 9 Am. St. Rep. 111; Forbes v. Ins. Co., 15 Gray, 254; 77 Am. Dec. 260; Stevens v. Warren, 101 Mass. 564; Franklin Ins. Co. v. Hazard, 41 Ind. 116; 13 Am. Rep. 313; Mo. Valley Ins. Co. v. Sturges, 18 Kan. 93; 36 Am. Rep. 761; Franklin Ins. Co. v. Sefton, 53 Ind. 380; Brockway v. Ins. Co., 9 Fed. Rep. 249; Fox v. Ins. Co., 4 Big. L. & Acc. Ins. Cas. 458; Mowry v. Home Ins. Co., 9 R. I. 346; Mut. Ben. Ins. Co. v. Hoyt, 46 Mich. 478; Ruse v. Ins. Co., 33 N. Y. 516; Lewis v. Ins. Co., 39 Conn. 104; Singleton v. Ins. Co., 66 Mo. 63; 37 Am. Rep. 331; Ins. Co. v. Bailey, 13 Wall. 619; Grattan v. Ins. Co., 15 Hun, 76; Warnock v. Davis, 104 U. S. 775; Trenton Ins. Co. v. Johnson, 34 N. J. (L.) 586; Miller v. Ins. Co., 3 E. D. Smith, 292; Hoyt v. Ins. Co., 3 Bosw. 446.

² Shaw, O. J., in Loomis v. Eagle, etc., Ins. Co., 6 Gray, 398.

³ Brockway v. Mutual Benefit Life Ins. Co., 9 Fed. Rep. 249; Morrell v. Trenton Mutual Life and Fire Ins. Co., 10 Cush. 282; 57 Am. Dec. 92; American Life and Health Ins. Co. v. Robertshaw, 26 Pa. St. 189; McKenty v. Ins. Co., 3 Dill. 448; Succession of Hearing, 26 La. Ann. 326; Henson v. Blackwell, 4 Hare, 434; Rawls v. Ins. Co., 37 N. Y. 232; 84 Am. Dec. 280; Mowry v. Ins. Co., 9 R. I. 346.

⁴ Gottlieb v. Oranch, 2 De S. M. & G. 446.

⁵ Miller v. Ins. Co., 3 E. D. Smith, 268; Woodfin v. Ins. Co., 6 Jones, 558; Summers v. Trust Co., 13 La. Am. 504.

⁶ Valton v. Ins. Co., 23 Barb. 9; 20 N. Y. 22; Com. Mut. Ins. Co. v. Luchs, 108 U. S. 498.

⁷ May on Ins. 109; citing Heddon v. West, 3 B. & S. 678.

⁸ Bliss on Life Ins., § 14.

advances money to another for the prosecution of an enterprise in the profits of which both are to share has an interest in the life of the other;¹ a surety in the life of his principal;² a tenant in the life of one whose estate is only a life estate.³

Where the interest is claimed through relationship alone it is held that a child has an interest in the life of a parent⁴ and a parent in the life of a child;⁵ a husband in the life of his wife;⁶ a sister in the life of a brother;⁷ a wife in the life of her husband,⁸ even if they are subsequently divorced;⁹ a woman in the life of a man to whom she is betrothed;¹⁰ a woman living unlawfully with a man as his wife in the life of the man.¹¹ But a brother has not an insurable interest in the life of a brother;¹² nor an uncle in the life of a nephew;¹³ nor a son-in-law in the life of his

¹ *Bevin v. Ins. Co.*, 23 Conn. 244; *Miller v. Ins. Co.*, 2 E. D. Smith, 268; *Morrell v. Ins. Co.*, 10 Cush. 282; 57 Am. Dec. 92.

² *Lee v. Hinton*, 5 De G. M. & G. 823; *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192.

³ *Sides v. Ins. Co.*, 16 Fed. Rep. 650.

⁴ *Reserve Ins. Co. v. Kane*, 81 Pa. St. 154; 22 Am. Rep. 741; *Warnock v. Davis*, 104 U. S. 775. *Contra*, *Guardian Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Continental Ins. Co. v. Volger*, 89 Ind. 572; 46 Am. Rep. 185.

⁵ *Loomis v. Ins. Co.*, 6 Gray, 396; *Mitchell v. Ins. Co.*, 45 Me. 104; 71 Am. Dec. 529; *Hoyt v. Ins. Co.*, 3 Bosw. 440; *Williams v. Ins. Co.*, 31 Iowa, 541; *Miller v. Ins. Co.*, 2 E. D. Smith, 268; *Reserve Life Ins. Co. v. Kane*, 81 Pa. St. 154; 22 Am. Rep. 741; *Grattan v. Ins. Co.*, 15 Hun, 74. But it is said that the rule as to father and son is different "where both parties are of mature age, and live apart in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other." *Guardian Ins. Co. v. Hogan*, *supra*.

⁶ *Bliss on Insurance*, § 12; *Conn. Mut. Ins. Co. v. Schaefer*, 94 U. S. 460; *Cur-*

rier v. Ins. Co., 57 Vt. 496; 53 Am. Rep. 134.

⁷ *Lord v. Dall*, 12 Mass. 115; 7 Am. Dec. 88; *Etna Ins. Co. v. France*, 94 U. S. 561.

⁸ *Barker v. Ins. Co.*, 48 N. Y. 283; *St. John v. Ins. Co.*, 2 Duer, 419; *Gambis v. Ins. Co.*, 60 Mo. 44; *Thompson v. Ins. Co.*, 46 N. Y. 674; *Equitable Ins. Co. v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535; *McKee v. Ins. Co.*, 28 Mo. 383; 75 Am. Dec. 129; *Holabird v. Ins. Co.*, 2 Dill. 166; *Conn. Mut. Ins. Co. v. Schaefer*, 94 U. S. 460; *Charter Oak Ins. Co. v. Brant*, 47 Mo. 419; 4 Am. Rep. 323.

⁹ *McKee v. Ins. Co.*, 28 Mo. 383; 75 Am. Dec. 129; *Conn. Mut. Ins. Co. v. Schaefer*, 94 U. S. 460.

¹⁰ *Chisholm v. Ins. Co.*, 52 Mo. 218; 14 Am. Rep. 414.

¹¹ *Equitable Life Ass. Soc. v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535; *Watson v. Continental Ass.*, 21 Fed. Rep. 698; *Contra*, *Holabird v. Ins. Co.*, 2 Dill. 166.

¹² *Lewis v. Ins. Co.*, 39 Conn. 100; *Bevin v. Ins. Co.*, 23 Conn. 244.

¹³ *Money v. Ins. Co.*, 9 R. I. 349; *Singleton v. Ins. Co.*, 66 Mo. 63; 27 Am. Rep. 321.

mother-in-law;¹ nor a step-son in the life of his step-father or his father's father.²

A distinction is to be noticed here between contracts of life insurance and contracts of insurance of property. In the latter case it is essential that the "interest" should exist both at the time the insurance is made and at the time the loss occurs, while in the case of a policy of life insurance, if there was a sufficient "interest" at the time it was taken out the insurer must pay the full amount of insurance according to the contract, without reference to the subsequent diminution or cessation of the insurable interest.³

§ 288. **Agreements for Future Delivery of Goods.**—Agreements of this kind, known in the language of the street and exchange as "futures," are condemned by judicial decision and legislative act as a species of gaming. A contract for the *bona fide* delivery of goods on a future day or when called for is a valid contract and enforceable,⁴ but if, under guise of a contract to deliver goods at a future day, the real intent be to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is a wager,

¹ *Rombach v. Ins. Co.*, 35 La. Ann. 233; 48 Am. Rep. 339.

² *United Brethren Soc. v. McDonald*, 123 Pa. St. 324; 9 Am. St. Rep. 111; *Gilbert v. Moose*, 18 Ins. Law. J. 297; 41 Leg. Int. 75.

³ *Conn. Mut. Ins. Co. v. Schaefer*, 94 U. S. 457; *Dalby v. Ins. Co.*, 15 Com. B. 265; *Trenton, etc., Ins. Co. v. Johnson*, 94 N. J. (L.) 576; *Hoyt v. Ins. Co.*, 3 Bosw. 446; *Miller v. Ins. Co.*, 2 E. D. Smith, 294; *Mowry v. Ins. Co.*, 9 R. I. 354; *St. John v. Ins. Co.*, 13 N. Y. 81; 64 Am. Dec. 529; *Olmstead v. Keyes*, 85 N. Y. 598; *Grattan*

v. Ins. Co., 15 Hun, 76; *Sides v. Ins. Co.*, 16 Fed. Rep. 630; *McKee v. Ins. Co.*, 28 Mo. 383; 75 Am. Dec. 129.

⁴ *Wollcott v. Heath*, 78 Ill. 483; *Cole v. Milmine*, 88 Ill. 349; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520; *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 523; *Strong v. Solomon*, 6 Daly, 531; 71 N. Y. 426; *Earl v. Howell*, 14 Abb. N. C. 474; *Hatch v. Douglass*, 48 Conn. 116; 40 Am. Rep. 154; *Clay v. Allen*, 63 Mass. 426; *Cobb v. Prell*, 15 Fed. Rep. 774; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155.

and is illegal.¹ In *Rumsey v. Berry*² the court say: "A contract for the sale and purchase of wheat, to be delivered in good faith at a future time, is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with the understanding that, at the appointed time, the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure." If one of the parties intends a *bona fide* sale, the contract may be enforced at his instance, though the other party may have intended simply a wager on future prices.³

§ 289. *Contracts Made on Sunday.* — At common law it was no objection to the validity of a contract that it had been entered into on Sunday;⁴ but since in nearly all the

¹ *Irwin v. Williar*, 110 U. S. 499; *Gregory v. Wendell*, 39 Mich. 337; 38 Am. Rep. 390; *Bullard v. Smith*, 139 Mass. 492; *Cassaid v. Hinman*, 1 Bosw. 907; *Samson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Clarke v. Foss*, 7 Biss. 540; *In re Green*, 7 Biss. 338; *Login v. Mulsick*, 81 Ill. 415; *Pickering v. Cease*, 79 Ill. 328; *Rumsey v. Berry*, 65 Mo. 570; *Waterman v. Buckland*, 1 Mo. App. 45; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745; *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771; *Tomblin v. Callen*, 69 Iowa, 227; *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Re Young*, 6 Biss. 53; *Hatch v. Douglass*, 48 Conn. 116; 40 Am. Rep. 154; *Pearce v. Foot*, 113 Ill. 228; 55 Am. Rep. 414; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Beveridge v. Hewitt*, 8 Brad. App. 467; *Enderby v. Gilpin*, 3 Moore, 571; *Schwartz's Appeal*, 3 Brewst. 131; *Bainard v. Backus*, 52 Wis. 593; *Everingham*

v. Meighan, 55 Wis. 354; *Yerkes v. Salomon*, 11 Hun, 473; *Story v. Salomon*, 71 N. Y. 426; *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 523; *Malton v. Sheen*, 75 Pa. St. 166; *Peabody v. Speyers*, 56 N. Y. 230; *Bran's Appeal*, 55 Pa. St. 298; *Williams v. Tiedemann*, 6 Mo. App. 269; *Kirkpatrick v. Adams*, 30 Fed. Rep. 287; *Pixley v. Boynton*, 79 Ill. 261.

² 65 Mo. 574.

³ *Williams v. Tiedemann*, 6 Mo. App. 269; *Pixley v. Boynton*, 79 Ill. 351; *Whitesides v. Hunt*, 97 Ind. 191; *Gregory v. Wendell*, 39 Mich. 337.

⁴ *Tucker v. West*, 29 Ark. 386; *Kepner v. Keefer*, 6 Watts, 231; 31 Am. Dec. 460; *Adams v. Gay*, 19 Vt. 385; *Bloom v. Richards*, 2 Ohio St. 387; *Amls v. Kyle*, 2 Yerg. 31; 24 Am. Dec. 463; *Brown v. Browning*, 15 R. I. 423; 2 Am. St. Rep. 906; *Swann v. Swann*, 21 Fed. Rep. 299; *Batesford v. Every*, 44 Barb. 618; *Richmond v. Moore*, 107 Ill. 429; *Moore v. Clymer*, 12 Mo. (App.) 11;

States statutes are in force prohibiting the doing of certain acts on the Lord's day, contracts which are in any manner in furtherance of such prohibited acts are illegal and unenforceable because made in violation of a statute. The apparent confusion and uncertainty in the decisions on the subject of Sunday contracts arises sometimes from the differing phraseology of the statutory provisions in the different States and sometimes from the conflicting opinions of the judges in construing the meaning of the particular words and phrases therein used.

Where a statute expressly prohibits the making of contracts on Sunday no difficulty arises and it may be likewise said that any agreement which is within the penalties of the Sunday laws and any executory contract the consideration of which is something unlawfully done on that day, is illegal and void.¹ Thus a loan of money;² a contract of hire of a horse;³ a warranty made on a sale or exchange of horses;⁴ a contract of insurance;⁵ the making and delivery of a promissory note,⁶ or a deed;⁷ an offer to rescind a contract;⁸ an exchange of property;⁹ or a demand of any

Hellams v. Abercrombie, 15 S. C. 110; 40 Am. Rep. 684; *Horacek v. Keebler*, 5 Neb. 355.

¹ *Allen v. Gardner*, 7 R. I. 22; *Hazard v. Day*, 14 Allen, 487; 92 Am. Dec. 790; *Tucker v. West*, 39 Ark. 386; *Oranson v. Goss*, 107 Mass. 439; 9 Am. Rep. 45; *Adams v. Hamell*, 3 Doug. 78; 43 Am. Dec. 455; *Pike v. King*, 16 Ia. 49; *Sayre v. Wheeler*, 31 Ia. 112; 32 Ia. 559; *Olough v. Goggins*, 40 Ia. 325; *Hussey v. Roquemore*, 27 Ala. 281; *Merriam v. Stearns*, 10 Cush. 257; *Slade v. Arnold*, 14 B. Mon. 287; *Morgan v. Bailey*, 59 Ga. 683; *Sellers v. Dugan*, 18 Ohio, 489; *Hill v. Sherwood*, 3 Wis. 343; *Love v. Wells*, 25 Ind. 503; *Robeson v. French*, 12 Met. 24; 45 Am. Dec. 236; *Pattee v. Greeley*, 18 Met. 299; *Gregg v. Wyman*, 4 Cush. 525; *Myers v. Melnrath*, 101 Mass. 369; *Woodman v. Hubbard*, 25 N. H. 67; 7 Am. Dec. 310. No action lies for fraudulent representations inducing to

a contract made on Sunday, although the representations were criminal. *Gunderson v. Richardson*, 56 Iowa, 55; 41 Am. Rep. 81.

² *Meador v. White*, 66 Me. 20; 23 Am. Rep. 551.

³ *Welden v. Chapple*, 8 R. I. 230; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576.

⁴ *Finley v. Quirk*, 9 Minn. 194; 58 Am. Dec. 93; *Murphy v. Simpson*, 14 B. Mon. 337; *Bradley v. Rea*, 14 Allen, 20; *Lyon v. Strong*, 6 Vt. 219.

⁵ *Heller v. Crawford*, 37 Ind. 379.

⁶ *O'Donnell v. Sweeney*, 5 Ala. 467; 39 Am. Dec. 337; *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179; *Morgan v. Bailey*, 59 Ga. 683.

⁷ *Love v. Wells*, 25 Ind. 503; 37 Am. Dec. 375.

⁸ *Merritt v. Robinson*, 35 Ark. 483.

⁹ *Myers v. Melnrath*, 101 Mass. 369; 3 Am. Rep. 368.

kind;¹ a contract for the publication of an advertisement in a newspaper to be published, sold, and distributed on Sunday;² a contract to make a balloon ascension upon Sunday from a garden open to the public on payment of admission fees,³ have all been held illegal because made on Sunday. Though negotiable paper executed and delivered on Sunday is void, yet where it is falsely dated as of another day it is good in the hands of a *bona fide* holder for value without notice.⁴

§ 290. **Construction of the Sunday Laws.** — A statute prohibiting "common labor" on the Lord's day has been held to invalidate a promissory note,⁵ but on the other hand it has been ruled that making a contract is not "common labor,"⁶ or "labor that disturbs the peace and good order of society,"⁷ and that a contract of marriage is not "labor, business or work."⁸ Giving a promissory note is "business of a secular calling"⁹ and so is the loaning of money¹⁰ and the signing of a petition.¹¹ Where the statute forbids the exercise of one's "ordinary calling" on Sunday a sale of goods by one not a merchant or trader is valid;¹² and so is the giving of a mortgage or a promissory note in a transaction outside of the maker's ordinary calling.¹³

¹ Brackett v. Edgerton, 14 Minn. 174; 100 Am. Dec. 211; Delamater v. Miller, 1 Cow. 75; 13 Am. Dec. 512.

² Smith v. Wilcox, 24 N. Y. 353; 19 Barb. 581; 25 Barb. 341.

³ Brunnett v. Blark, 1 Buff. (N. Y.) Sup. Ct. 500.

⁴ Ball v. Powers, 62 Ga. 757; Heise v. Bumpuss, 40 Ark. 575; Cranson v. Goss, 107 Mass. 439; 9 Am. Rep. 45; Johns v. Bailey, 45 Iowa, 241; Knox v. Clifford, 38 Wis. 651; 20 Am. Rep. 28; Beman v. Wessels, 53 Mich. 594.

⁵ Reynolds v. Stevenson, 4 Ind. 617; but see Glover v. Cheatham, 19 Mo. App. 656.

⁶ Horacek v. Keebler, 5 Neb. 355.

⁷ Richmond v. Moore, 107 Ill. 429; 47 Am. Rep. 445.

⁸ Bennett v. Brooks, 9 Allen, 118. See Gangwere's Estate, 14 Pa. St. 417; 53 Am. Dec. 554.

⁹ Varney v. French, 19 N. H. 233.

¹⁰ Troewert v. Decker, 51 Wis. 46; 37 Am. Rep. 808.

¹¹ DeForth v. Wisconsin R. Co., 52 Wis. 320; 38 Am. Rep. 737.

¹² Merritt v. Earle, 31 Barb. 38; Mills v. Williams, 16 S. C. 533; Moore v. Murdock, 26 Cal. 514; Sanders v. Johnson, 29 Ga. 526; Kaufman v. Hamm, 30 Mo. 337; Allen v. Gardner, 7 R. I. 22.

¹³ Hellams v. Abercrombie, 15 S. C. 110; 40 Am. Rep. 684; Sanders v. Johnson, *supra*.

§ 291. **Works of Necessity or Charity.** — The statutes generally except acts or works of necessity or charity. "By the word 'necessity,'" it is said, "we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of any particular case."¹ Therefore to make a contract for the relief of a sick pauper;² or to preserve property exposed to imminent danger;³ or to make a subscription to the building of a church;⁴ or to repair the tracks of a railroad;⁵ or to secure decent burial for one's wife, and to secure the presence of relatives at her funeral;⁶ would all be considered to come within these words of exception.

§ 292. **Contracts Partly Executed on Sunday.** — A contract not finally executed on Sunday is not void because some of its terms may have been agreed to on that day;⁷ as for example an agreement made on Sunday, but executed and carried into effect on a week-day;⁸ or a note signed on Sunday, but not delivered until a week-day;⁹ or a sale of goods agreed upon on Sunday, and the goods selected and set apart, the delivery being made on Monday.¹⁰

¹ *Flagg v. Millbury*, 4 Oush. 243.

² *Aldrich v. Blackstone*, 128 Mass. 148.

³ *Whitcomb v. Gilman*, 35 Vt. 297; *Farmelee v. Wilks*, 23 Barb. 539.

⁴ *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389; 43 Am. Rep. 624. *Contra*, *Catlett v. Trustees*, 62 Ind. 365; 30 Am. Rep. 197.

⁵ *Yonoski v. State*, 79 Ind. 396; 41 Am. Rep. 614.

⁶ *Gulf, etc., R. R. Co. v. Levy*, 59 Tex. 542.

⁷ *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605; *Peake v. Conlan*, 48 Ia. 297; *Dickenson v. Richmond*, 97 Mass. 45; *Bryant v. Booze*, 55 Ga. 438; *Tuckerman v. Hinckley*, 9 Allen, 452; *Gibbs Manfg. Co. v. Brucker*, 111 U. S. 697; *Meriwether v. Smith*, 44 Ga. 541; *Luebbering v. Oberketter*, 1 Mo. App. 393; *Merrill v. Downs*, 41 N. H. 72; *Bradley v. Rea*, 108

Mass. 188; 4 Am. Rep. 524; *Stackpole v. Symonds*, 23 N. H. 327; *Moseley v. Van Hooser*, 6 Lea, 236; 40 Am. Rep. 37; *Uhler v. Applegate*, 26 Pa. St. 140; *Beltenman's Appeal*, 55 Pa. St. 183; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 231. But see *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179; *Foreman v. Ahl*, 55 Pa. St. 325; *Bradley v. Rea*, 14 Allen. 90.

⁸ *Taylor v. Young*, 61 Wis. 314.

⁹ *King v. Fleming*, 72 Ill. 21; 33 Am. Rep. 181; *Dohoney v. Dohoney*, 7 Bush, 217; *Hilton v. Houghton*, 35 Me. 143; *Hill v. Dunham*, 7 Gray, 543; *Adams v. Gay*, 19 Vt. 358; *Stacy v. Kemp*, 97 Mass. 168; *Lovejoy v. Whipple*, 18 Vt. 379; 46 Am. Dec. 157; *Burns v. Moore*, 76 Ala. 339; 52 Am. Rep. 332; *Bill v. Mabin*, 69 Iowa, 408.

¹⁰ *Rosenblatt v. Townsley*, 73 Mo. 536.

§ 293. **Rescission and Ratification of Such Contracts.**—

A contract which could not be lawfully made on Sunday cannot, if lawfully made, be rescinded on that day.¹ As to whether a contract made on Sunday, and therefore void, can be ratified by a subsequent agreement, there is a conflict in the decisions; a large number of them holding that a ratification may be made;² a few of them that it may not.³

(b) *Contracts in Breach of Common Law.*

§ 294. **Introductory.**—The courts will not enforce an agreement the object of which is forbidden by law, and it is immaterial in this respect whether the object of the agreement is forbidden by the common law or by a statute;⁴ or whether the thing forbidden by law is *malum in se* or merely *malum prohibitum*.⁵

§ 295. **Contracts with Alien Enemies.**—A contract with an alien enemy is illegal and void, and as stated in the leading English case upon the subject, not on any ground of public policy, but because “it was a principle of the common law that trading with an enemy without the king’s license was illegal in British subjects.”⁶ In the American courts it is laid down that the law prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and this

¹ *Benedict v. Bachelder*, 24 Mich. 426; 9 Am. Rep. 130.

² *Adams v. Gay*, 19 Vt. 258; *Campbell v. Young*, 9 Bush. 245; *Melchoir v. McCarty*, 31 Wis. 256; 11 Am. Rep. 605; *Tucker v. West*, 29 Ark. 386; *Sayles v. Wellman*, 10 R. I. 486; *Gwinn v. Simes*, 61 Mo. 335; *Harrison v. Colton*, 31 Iowa, 16; *Blood v. Bates*, 31 Vt. 147; *Winchell v. Carey*, 115 Mass. 560; 15 Am. Rep. 151; *Clough v. Davis*, 9 N. H. 500; *Van Hoven v. Irish*, 3 McCrary, 443; *Sumner v. Jones*, 24 Vt. 317; *Flinn v. St. John*, 51 Vt. 334; *Wilson v. Milligan*, 75 Mo. 41; *Parker v. Potts*, 73 Ind. 597; 38 Am. Rep. 155.

³ *Plaistead v. Palmer*, 63 Me. 576; *Day v. McAllister*, 15 Gray, 433; *Kounts v. Price*, 40 Miss. 341.

⁴ *Wheeler v. Russell*, 17 Mass. 255; *Munsell v. Temple*, 3 Gilm. 93; *Naah v. Monheimer*, 20 Ill. 215; *Wells v. People*, 71 Ill. 532; *Byrd v. Hughes*, 84 Ill. 174.

⁵ *Penn v. Bornman*, 102 Ill. 523; *Bank v. Owens*, 2 Pet. 527; *White v. Buss*, 3 Cush. 448.

⁶ *Potts v. Bell*, 8 T. R. 438; see *ante*, § 123.

includes any act of voluntary submission to the enemy or receiving his protection, as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods or orders for the delivery of either, between the two countries, whether directly or indirectly or through the intervention of third persons or partnerships, or by insurances upon trade with or by the enemy.¹

§ 296. **Agreements to Commit a Crime.**—An agreement to commit a crime or an indictable offense would be illegal as in breach of a rule of the common law when the crime was a common law offense, and in breach of a statute when it was a statutory offense.² Illustrations of agreements void because made in furtherance of the commission of a crime are an agreement by which one of the parties undertakes to make an assault on a third person;³ a contract with a printer to print or a publisher to sell a libelous book;⁴ a contract to write an immoral book;⁵ a contract to indemnify the publisher of a libel;⁶ a contract to indemnify another for committing a willful and malicious trespass;⁷ or an agreement to marry where the parties are already married to the knowledge of each other, for this would be an agreement to commit bigamy.⁸

§ 297. **Agreements to Commit a Civil Wrong.**—An agreement to commit a civil wrong is a frequent form of con-

¹ *Kershaw v. Kelsey*, 100 Mass. 561; *Montgomery v. U. S.*, 15 Wall. 395; *Scholfeld v. Eichelberger*, 7 Pet. 586; *U. S. v. Grossmeyer*, 9 Wall. 73; *Cappell v. Hall*, 7 Wall. 543; *The Rapid*, 8 Cranch 135; *Perkins v. Rogers*, 35 Ind. 124; *Shaklett v. Polk*, 51 Miss. 378; *Rhodes v. Summerhill*, 4 Helak. 204; *Hill v. Baker*, 33 Iowa, 302; *Hennen v. Gilman*, 20 La. Ann. 241; *Phillips v. Hatch*, 1 Dill. 571; *Habricht v. Alexander*, 1 Woods, 413.

² *Collins v. Blantern*, 2 Wils. 347; *Henderson v. Palmer*, 71 Ill. 579.

³ *Allen v. Rescous*, 2 Lev. 174.

⁴ *Poppett v. Stockdale*, 1 R. & M. 337.

⁵ *Gale v. Leckie*, 2 Stark, 98.

⁶ *Arnold v. Clifford*, 2 Sum. 238; *Atkins v. Johnson*, 43 Vt. 78; 5 Am. Rep. 260.

⁷ *Ives v. Jones*, 3 Ired. 538; 40 Am. Dec. 421.

⁸ See *Paddock v. Robinson*, 63 Ill. 99; 14 Am. Rep. 112.

tract in breach of rules of the common law and hence void.¹ The kind of agreement most usually met with is one to commit some fraud on a third party or on the public as, for example, a contract for the sale of domestic sardines to be packed in boxes with labels representing them as foreign sardines;² or a contract by which a tradesman having a reputation as a seedsman sells his empty bags with their labels to another to be filled and sold by him in a certain district as seeds grown by the former;³ or a contract between two physicians whereby one is to personate the other at his office for the purpose of medical practice;⁴ or an agreement whereby a physician is to explain to a railroad company the injuries received by A at the hands of the company, and the physician's compensation is to vary according to the sum which the company shall pay A;⁵ or an agreement between the father and the grandfather of an infant legatee, on one side, and an heir at law, not a legatee, on the other, that the latter should resist and the former should not insist on probate, and if the will should be set aside, the heir should pay the infant the amount of his legacy, the object being to defeat a residuary legatee;⁶ or a contract by which one trustee agrees, for a pecuniary compensation to himself, to permit his co-trustee to have control of the trust fund.⁷ In *Begbie v. Phosphate Sewage Co.*⁸ the plaintiff purchased from the defendants an exclusive right to use a scientific process which it turned out they had no right to sell. But it was held that there could be no recovery, it be-

¹ Clement's Appeal, 52 Conn. 464; McCall v. Capehart, 20 Ala. 521; Hatch v. Mann, 15 Wend. 44; Commissioners of Knox Co. v. McComb, 19 Ohio St. 320; Materne v. Horwitz, 101 N. Y. 470; Huckins v. Hunt, 138 Mass. 366; Gray v. McReynolds, 65 Iowa, 461; Hatch v. Mann, 15 Wend. 45.

² Materne v. Horwitz, 101 N. Y. 470.

³ Bloss v. Bloomer, 23 Barb. 604.

⁴ "No man," said the court, "has the right to sell his reputation or skill in

any profession whatever it may be and thus enable an unknown party to perpetrate a fraud upon the public in his name." Jerome v. Bigelow, 66 Ill. 452.

⁵ Thomas v. Caulkett, 57 Mich. 392; 58 Am. Rep. 369.

⁶ Gray v. McReynolds, 65 Ia. 461; 54 Am. Rep. 16.

⁷ Foote v. Emerson, 10 Vt. 333; 33 Am. Dec. 205.

⁸ L. R. 10 Q. B. 499.

ing proved by the plaintiff's own evidence that he had purchased it in order to float a company from which he expected to make a profit through a fraud on the stockholders.

In all these cases fraud being a civil wrong an agreement to commit a fraud is an agreement to do an illegal act.

§ 298. **Fraud and Illegality Distinguished.** — It is important here to distinguish fraud as a civil wrong from fraud as a vitiating element in a contract — which has been treated in a previous chapter.¹ Fraud as we have seen² may vitiate a contract not because it is a civil wrong but because as between the parties the fraud of one of them has prevented the consent of the other from being a genuine consent. The difference between LEGALITY OF OBJECT and REALITY OF CONSENT may be illustrated thus: A by a fraudulent representation induces B to enter into a contract with him. The contract is voidable by B because his consent was not genuine or real. C and D enter into a contract the object of which is to defraud E. The contract is void because C and D have agreed to do what is illegal.

§ 299. **Frauds upon Creditors — Assignments for Benefit of Creditors.** — An assignment of his property by a debtor to a third person for the benefit of his creditors is a contract made for the benefit of a third party, for it creates a trust which cannot be revoked by the debtor or annulled by even the joint act of the debtor and the assignee.³ Such

¹ *Ante*, § 226.

² *Ante*, § 205.

³ *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 219; *Union Bank v. Com. Bank*, 94 Ill. 271; *Scully v. Reeves*, 3 N. J. (Eq.) 131; 29 Am. Dec. 703; *Sevier v. McWhorter*, 27 Miss. 442; *Hall v. Dennison*, 17 Vt. 318; *Messonnier v. Kauman*, 3 Johns. Ch. 3; *Ingram v. Kirkpatrick*, 6 Ired. (Eq.) 463; 51 Am. Dec. 428; *Walker v. Crowder*, 2 Ired. (Eq.) 485; *Ward v. Lewis*, 4 Pick. 521; *Watson v. Bagaley*, 12 Pa. St. 164; 51 Am. Dec. 595; *Ward v. Winslow*, 4 Pick.

518; *Petrikov v. Davis*, 1 Morris, 296; *Jones v. Dougherty*, 10 Ga. 274. And a conveyance of the property to the debtor by the trustee, where the object of the trust has not been completed, is void. *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 863; *Russell v. Russell*, 36 N. Y. 535; 93 Am. Dec. 540; *Julland v. Rathbone*, 39 Barb. 102; 39 N. Y. 869; *In re Ludlington*, 5 Abb. N. C. 329; *Griswold v. Perry*, 7 Lana. 104; *Hardman v. Bowman*, 39 N. Y. 196; 5 Abb. Pr. (N. s.) 337.

conveyances are valid¹ even (unless prohibited by statute)² where certain creditors or classes of creditors are preferred over others.³ But where made with the intention of delaying, hindering or defrauding creditors in obtaining payment of their claims they are always held to be void;⁴ as where it is intended to secure some benefit or advantage to the debtor⁵ by reserving to himself the control or possession of

¹ *Corning v. White*, 3 Paige, 567; 32 Am. Dec. 659; *Malcolm v. Hall*, 9 Gill, 177; 52 Am. Dec. 688; *Wilson v. Pearson*, 20 Ill. 81; *Savery v. Spaulding*, 8 Iowa, 239; 74 Am. Dec. 300; *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Baldwin v. Peet*, 23 Tex. 708; 75 Am. Dec. 806; *Bentz v. Hockey*, 69 Pa. St. 77.

² See *Egbert v. Wood*, 3 Paige, 517; 24 Am. Dec. 236; *O'Kayne v. Hyde*, 70 Cal. 6; *Crawford v. Taylor*, 6 Gill & J. 323; 26 Am. Dec. 579; *Widgery v. Haskell*, 5 Mass. 144; 4 Am. Dec. 41; *Varnum v. Camp*, 13 N. J. (L.) 326; 25 Am. Dec. 476; *Garretson v. Brown*, 26 N. J. (L.) 426; *Moore v. Bonnell*, 31 N. J. (L.) 90; *Hurd v. Sils*, 10 N. H. 108; 34 Am. Dec. 142; *Pringle v. Rhame*, 10 Rich. 72; 67 Am. Dec. 569; *Perry Trust Co. v. Foster*, 56 Ala. 502; 29 Am. Rep. 779; *Wharton v. Clements*, 3 Dill. 209; *Newman v. Mining Co.*, 57 Mich. 97; *Austin v. Morris*, 23 S. C. 393; *McKee v. Scoble*, 30 Ky. 124; *Webb v. Armstead*, 26 Fed. Rep. 70; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257.

³ *Nye v. Van Huse*, 6 Mich. 329; 74 Am. Dec. 690; *Redpath v. Trutweller*, 108 Ind. 248; *Turner v. Jaycox*, 40 N. Y. 470; *Bates v. Simmons*, 62 Wis. 69; *Fitzpatrick v. Flanagan*, 106 U. S. 648; *Nolon v. Douglas*, 2 Hill (Eq.) 443; 30 Am. Dec. 368; *Hull v. Jeffrey*, 8 Ohio, 390; *Grover v. Wakeman*, 11 Wend. 187; 25 Am. Dec. 624; *Corning v. White*, 3 Paige, 566; 23 Am. Dec. 661; *Webb v. Peele*, 7 Pick. 247; 19 Am. Dec. 284; *Deaver v. Savage*, 3 Mo. 239; 25 Am. Dec. 437; *Skipwith v. Cunningham*, 8 Leigh, 371; 31 Am. Dec. 642; *Hempstead v. Johnston*, 18 Ark. 123; 65 Am. Dec. 458; *York Bank v. Carter*, 38 Pa. St. 448; 80 Am. Dec. 494; *Wilmer's Appeal*, 45 Pa. St. 462; *Cuendet v. Lahmer*, 15 Kan. 597; *Strauss v. Rose*, 59 Md.

525; *Ring v. Ring*, 12 Mo. App. 88; *Bar-nard v. Life Ins. Co.*, 4 Mackey, 63; *Estes v. Gunter*, 123 U. S. 450; *Burr v. Clement*, 9 Col. 1; *Haynes v. Brooks*, 17 Abb. N. C. 152; *Wilkes v. Ferris*, 5 Johns. 335; 4 Am. Dec. 384; *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Williams v. Buz-zard*, 11 Ark. 718; *Cox v. Fraley*, 27 Ark. 20; *Bates v. Coe*, 10 Conn. 280; *Wheaton v. Neville*, 19 Cal. 41; *Thornton v. Tandy*, 39 Tex. 544; *Morse v. Sloan*, 13 Vt. 236; *Tompkins v. Wheeler*, 16 Pet. 106; *Gid-dings v. Sears*, 115 Mass. 505; *Hill v. Bow-man*, 35 Mich. 191; *Kuykendall v. Mc-Donald*, 15 Mo. 416; 57 Am. Dec. 219; *Henderson v. Henderson*, 53 Mo. 584; *Milburn v. Beach*, 14 Mo. 104; 55 Am. Dec. 91; *Bull v. Harris*, 18 B. Mon. 193; *Hop-kins v. Beebe*, 26 Pa. St. 85; *Covanhoven v. Hart*, 21 Pa. St. 495; *Horn v. Shaw*, 29 Pa. St. 238; 73 Am. Dec. 633; *Funk v. Staats*, 24 Ill. 632; *Sheed v. Bank*, 32 Vt. 709; *Waddams v. Humphrey*, 22 Ill. 661; *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562; *Sommerville v. Horton*, 4 Yerg. 541; 26 Am. Dec. 242.

⁴ *Knight v. Packer*, 19 N. J. (Eq.) 214; 72 Am. Dec. 368; *Livermore v. McNair*, 34 N. J. (Eq.) 484; *Fairchild v. Hunt*, 14 N. J. (Eq.) 373; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122; *Young v. Hall*, 6 Lea, 175.

⁵ *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Banfield v. Whipple*, 14 Allen, 13; *Embry v. Clapp*, 38 Ga. 245; *Bentz v. Hockey*, 69 Pa. St. 71; *Sommerville v. Horton*, 4 Yerg. 541; 26 Am. Dec. 242; *Doyle v. Smith*, 1 Cold. 20; *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297; *Arthur v. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Lawrence v. Norton*, 15 Fed. Rep. 833; *Kayser v. Havenrich*, 5

the property; ¹ or exacting a release of their claims from the creditors; ² or in any manner raising a presumption of fraud or bad faith on his part in making the assignment.³

§ 300. *Same — Compositions with Creditors.* — In a composition agreement ⁴ between a debtor and his creditors, any secret agreement made with one creditor for a preference over the others, whether by paying him or promising to pay him a larger sum than the others are to receive, or giving him better security for his claim, is illegal and void as a fraud upon the other creditors, because they are induced to consent to the composition under the idea that every creditor is obtaining the same treatment, each of whom had promised to forego a portion of his debt in con-

Kan. 324; *Muller v. Norton*, 19 Fed. Rep. 719.

¹ *Haydock v. Coope*, 53 N. Y. 69; *Anderson v. Fuller*, 1 McMull. (Eq.) 27; 36 Am. Dec. 290; *Place v. Langworthy*, 13 Wis. 629; 80 Am. Dec. 758; *Brooks v. Wimer*, 20 Mo. 403; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Mo. 269; *Billingsley v. Bunce*, 28 Mo. 547; *Davis v. Rawson*, 18 Mo. 396; *McCormack v. Atkinson*, 78 Va. 8; *Means v. Montgomery*, 23 Fed. Rep. 421; *Keevil v. Donaldson*, 20 Kan. 165; *Whallon v. Scott*, 10 Watts, 237.

² *Wheeler v. Evans*, 26 Me. 133; *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297; *Stewart v. Spenser*, 1 Curt. 165; *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568; *Goddard v. Hapgood*, 25 Vt. 351; 60 Am. Dec. 373; *Gadsden v. Carson*, 9 Rich. (Eq.) 252; 70 Am. Dec. 207; *Hubbard v. McNaughton*, 43 Mich. 220; 38 Am. Rep. 176; *Duggan v. Bliss*, 4 Colo. 223; 34 Am. Rep. 80; *Greeley v. Dixon*, 21 Fla. 413; 58 Am. Rep. 673; *Francis v. Herz*, 55 Ga. 249; *Mayer v. Shields*, 59 Miss. 107; *Donohoe v. Fish*, 58 Tex. 164; *Ware v. Wanless*, 2 Wyo. 144; *Atkinson v. Jordan*, 5 Ohio, 293; 24 Am. Dec. 281; *Borden v. Sumner*, 4 Pick. 265; 16 Am. Dec. 338; *Hyslop v. Clark*, 14 Johns. 453; *Grover v. Wakeman*, 11 Wend. 187; 25 Am. Dec. 624; *Spaulding v. Strang*, 38 N. Y. 9; *Brown v. Knox*, 6 Mo. 302; *Drake v. Rogers*, 6 Mo. 317; *Wilde v. Rawlings*, 1

Head, 34; *Hafner v. Irwin*, 1 Ired. 301; *Hurd v. Silsby*, 10 N. H. 108; 34 Am. Dec. 142; *Bennett v. Ellison*, 23 Minn. 242; *Carlton v. Baldwin*, 23 Tex. 724; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Miller v. Conklin*, 17 Ga. 436; 63 Am. Dec. 248; *McBride v. Bohannon*, 50 Ga. 527; *Pearson v. Crosby*, 23 Me. 261. In some States such a possession is valid if the assignment is of all the debtor's property. *Kevna v. Branch*, 1 Gratt. 274; *Gordon v. Cannon*, 18 Gratt. 387; *Clayton v. Johnson*, 33 Ark. 406; 38 Am. Rep. 40; *Dodd v. Martin*, 15 Fed. Rep. 338; *Clarke v. Figgins*, 27 W. Va. 613; *Lippincott v. Barker*, 3 Binn. 174; 4 Am. Dec. 433; *Pearpont v. Graham*, 1 Wash. C. C. 232; *Brashear v. West*, 7 Pet. 608; *Livingston v. Beel*, 3 Watts, 108; *Hennessey v. Bank*, 6 Watts & S. 300; *Thomas v. Jenks*, 5 Rawle, 221; *Lee's Appeal*, 9 Pa. St. 504; *Wilson's Accounts*, 4 Pa. St. 430; 45 Am. Dec. 701; *Green v. Friebar*, 3 Md. 11; *Coakley v. Well*, 47 Md. 277; *Doc-ray v. Dockray*, 2 R. I. 547; *Nightingale v. Harris*, 6 R. I. 321; *LePrince v. Guillemot*, 1 Rich. (Eq.) 187; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642.

³ For the numerous acts which will raise this presumption see *Lawson Rights, Rem. & Pr.*, § 1990-1992.

⁴ As to validity of such agreements, see *ante*, § 197; *Consideration*.

sideration of the others foregoing theirs in a like proportion.¹ And no action can be maintained on the promise or on a note or bond given for such a preference, and the debtor may set up the fraud as against the creditor or any other person not a *bona fide* holder for value without notice.² The creditor who procures such fraudulent preference cannot recover even the amount of the composition, as the whole agreement between him and his debtor is an entire agreement, and is vitiated by the fraud.³

§ 301. **Conveyances in Fraud of Creditors.** — All conveyances of property both real and personal not made in good faith and upon a valuable consideration or made with the intention of hindering, delaying or defrauding creditors, are void by a principle of the common law⁴ as against existing creditors. So a voluntary conveyance by a husband to his wife of his property is invalid as to his creditors, as a fraud on them, in that it withdraws from his estate property or money which should in right and justice go to them in payment of their claims.⁵ The conveyance, however, is

¹ O'Shea v. Collier White Lead Co., 42 Mo. 397; Cobleigh v. Pierce, 32 Vt. 788; Bean v. Amsink, 10 Blatchf. 361; Partridge v. Messer, 14 Gray, 180; Bean v. Brookmire, 3 Dill. 108; Ramsdell v. Edgerton, 8 Met. 227; 41 Am. Dec. 503; Yeomans v. Chatterton, 9 Johns. 296; 6 Am. Dec. 277; Sharp v. Teese, 9 N. J. (L.) 362; 17 Am. Dec. 479; Dexter v. Snow, 12 Cush. 594; 59 Am. Dec. 206; Solinger v. Earle, 82 N. Y. 393; In re Clements, 52 Conn. 464.

² Way v. Langley, 15 Ohio St. 392; Lawrence v. Clark, 36 N. Y. 128; Pinneo v. Higgins, 12 Abb. Pr. 334; Carroll v. Shields, 4 E. D. Smith, 466.

³ Howden v. Haigh, 11 Ad. & El. 1033, 3 Perry & D. 661.

⁴ The common law rule was subsequently approved by Parliament in an enactment known as the statutes of 13 and 27 Elizabeth, whose provisions have been substantially followed in all of the States. See Twyne's Case, 3 Coke, 80; Cadogan v. Kennett, Cowp. 432; 2 Kent's

Com. 515; Whittlesey v. McMahon, 10 Conn. 141; Avery v. Street, 6 Watta. 248; Hudnal v. Wilder, 4 McCord, 297; Doyle v. Sleeper, 1 Dana, 583; Hamilton v. Russell, 1 Cranch, 316; Meeker v. Wilson, 1 Gall. 419; Adams v. Broughton, 13 Ala. 739; O'Daniel v. Crawford, 4 Div. 203; Wilt v. Franklin, 1 Binn. 514; Whitmore v. Woodward, 28 Me. 392.

⁵ Clark v. Killian, 103 U. S. 766; Jones v. Clifton, 101 U. S. 225; Davis v. Herrick, 37 Me. 397; Story v. Marshall, 24 Tex. 305; 76 Am. Dec. 106; Phillips v. Meyers, 82 Ill. 67; 25 Am. Rep. 295; Beach v. White, Walk. Ch. 495; U. S. Bk. v. Ennis, Wright, 605; Spears v. Shropshire, 11 La. Ann. 559; 66 Am. Dec. 206; Fox v. Jones, 1 W. Va. 206; 91 Am. Dec. 383; Reade v. Livingston, 3 Johns. Ch. 481; 6 Am. Dec. 520; Annin v. Annin, 24 N. J. (Eq.) 184; Cramer v. Reford, 17 N. J. (Eq.) 367; 90 Am. Dec. 594; Clarke v. McGelhan, 25 N. J. (Eq.) 423; Watson v. Riskmire, 45 Iowa, 231; Davidson v. Lanier, 51 Ala. 318; Bowser v. Bowser,

valid as to subsequent creditors, unless made with express fraud, for in this case the reason just given is not present, as they have not contracted with him on the credit of property which he did not possess at the time they dealt with him.¹ And so a husband has a right to settle the surplus of his property, over and above what he owes, for the benefit of his wife and family.²

Such conveyances it must be noted are to be distinguished from other kinds of contracts void because illegal, in this respect, viz., frauds upon creditors never affect the validity of the conveyance as between the parties to it,³ for the fraud on the creditors does not enable the vendor to rescind the sale and recover his property,⁴ nor enable the vendee to refuse to pay the consideration agreed upon.⁵

§ 302. Contracts of Agents and Persons in Fiduciary Relations. — We have seen that on the principle that an agent shall not be allowed to put himself in a position in which his interest and his duty will conflict, an agent is subject to a number of disabilities while acting in that capacity, among the most important of which are that he shall not deal on his own account in the business of the agency; shall not act as agent for both parties; shall not

82 Pa. St. 57; *Nippes's Appeal*, 75 Pa. St. 472; *Cole v. Tyler*, 85 N. Y. 78; *Coleman v. Burr*, 93 N. Y. 17; 45 Am. Rep. 160; *Belford v. Orane*, 16 N. J. (Eq.) 265; 84 Am. Dec. 155.

¹ Cases cited in last note.

² *Gridley v. Watson*, 53 Ill. 186; *White v. Bettis*, Helsk. 645; *Vance v. Smith*, 2 Helsk. 343; *Brookbank v. Kennard*, 41 Ind. 389; *Spring v. Hight*, 22 Me. 408; 39 Am. Dec. 587; *Barnett v. Goings*, 8 Blackf. 234; 44 Am. Dec. 767; *Sims v. Rickets*, 35 Ind. 181; 9 Am. Rep. 679; *Jones v. Olifton*, 101 U. S. 225.

³ *Finley v. McConnell*, 60 Ill. 259; *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Schuman v. Peddicord*, 50 Md. 560; *Lemay v. Bibeau*, 2 Minn. 291; *But-*

ler v. Wendell, 57 Mich. 62; 58 Am. Rep. 329; *Osborne v. Adams*, 7 Johns. 161.

⁴ *Osborne v. Morse*, 7 Johns. 161; *Murphy v. Hubert*, 16 Pa. St. 50; *Telford v. Adams*, 9 Watts, 429; *Broughton v. Broughton*, 4 Rich. 491; *Jackson v. Garnsey*, 16 Johns. 189; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Dearman v. Radcliffe*, 5 Ala. 192; *Clapp v. Tirrell*, 20 Pick. 247; *Garner v. Graves*, 54 Ind. 188; *Reichart v. Castator*, 5 Blinn. 109; *Beebe v. Sautler*, 87 Ill. 519; *Stephens v. Harrow*, 26 Iowa, 458.

⁵ *Butler v. Moore*, 73 Me. 151; *Davey v. Kelley*, 66 Wis. 457; *Carpenter v. McClure*, 39 Vt. 9; *Findley v. Cooley*, 1 Blackf. 262; *Gary v. Jacobson*, 55 Miss. 204; *Bryant v. Mansfield*, 22 Me. 380; *Dyer v. Homer*, 22 Pick. 253.

take advantage of his position to make a private profit for himself, and shall not do any act inconsistent with the interests of the principal.¹ Contracts tending to a breach of these rules are always voidable at the suit of the principal as a fraud upon his rights. The rule embraces all classes of agents — general and special agents, attorneys, auctioneers, brokers and factors — and extends to all persons not strictly agents, but holding fiduciary relations to others, as, for instance, partners,² guardians,³ executors and other trustees. Thus a lease renewed by a partner, a trustee, executor, or other fiduciary person in his own name and for his own benefit, even in the absence of fraud, and even upon the refusal of the lessor to grant a new lease to the *centui que trust*, will in equity be considered as held in trust for the benefit of the persons entitled to the old lease.⁴ Such transactions, like conveyances in fraud of creditors, are valid between the parties but voidable at the instance of the persons whose rights they affect.

§ 303. **Agreements Between Creditor and Debtor Affecting Sureties.** — It is an every-day occurrence that A in making a contract with B obtains C to guarantee that he (A) will fulfil it. This is called a contract of guaranty or suretyship and C is described as the guarantor or surety. And because it is obvious that as all C in such case intended to do was to stand responsible for the performance of the agreement by A as it was originally made, it is well settled that any contract or dealing by the creditor (B) with the principal debtor (A) which amounts to a variation

¹ See *ante*, § 181.

² *Lockwood v. Beekwith*, 6 Mich. 168; 72 Am. Dec. 69; *Kilbourn v. Latta*, 5 Mackey, 304; 60 Am. Rep. 373; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Anderson v. Whitlock*, 3 Bush. 398; 92 Am. Dec. 499; *Johnson's Appeal*, 115 Pa. St. 127; 3 Am. St. Rep. 539; *Croswell v. Lehman*, 54 Ala. 363; 25 Am. Rep. 684; *Jones v. Dexter*, 130 Mass. 390; 29

Am. Rep. 459; *Mitchell v. Reed*, 61 N. Y. 123; 19 Am. Rep. 252.

³ *Lawson Rights, Rem & Fr.*, § 879.

⁴ *Phyfe v. Wardell*, 6 Paige, 268; 29 Am. Dec. 430; *Mitchell v. Reed*, 61 N. Y. 123; 19 Am. Rep. 252; *Keech v. Sandford*, 1 Eq. Lead. Cas. 46; *Davon v. Fleming*, 2 Johns. Ch. 282; *Anderson v. Lemon*, 3 N. Y. 236; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304.

from the contract by which the surety (C) was to be bound, and which by possibility might vary or enlarge the latter's liability without his consent, operates as a discharge of his liability as surety.¹ The surety has a right to be consulted in the matter "and if he is not or does not consent he will be no longer bound, and the court will not inquire whether it is or is not to his injury."² C for example is discharged when B releases or promises by a valid agreement to release A from his obligation,³ or where B, holding other securities for the payment of the debt or the performance of the agreement, releases them.⁴ So an ex-

¹ *Mayhew v. Boyd*, 5 Md. 102; 59 Am. Dec. 101; *Smith v. Tunno*, 1 McCord, 442; 16 Am. Dec. 617; *Bailey v. Boyd*, 75 Ind. 125; *New Flow Co. v. Walmsley*, 110 Ind. 243.

² *Paine v. Jones*, 76 N. Y. 374; *Rowan v. Sharp's Rifle Man. Co.*, 33 Conn. 1; *Bensinger v. Wren*, 100 Pa. St. 500. Nevertheless the surety is not released by any dealings between the parties or act of the creditor which does not place him in a worse position than he was before and which is immaterial to his liability. *Driskell v. Mateer*, 81 Mo. 325; 80 Am. Dec. 106. As where an extension of time is without consideration. *Brinagar v. Phillips*, 1 B. Mon. 223; 86 Am. Dec. 575; *Martin v. Pope*, 6 Ala. 532; 41 Am. Dec. 66; *Rucker v. Robinson*, 38 Mo. 154; 90 Am. Dec. 413; *Brown v. Kirk*, 30 Mo. App. 324; *Byers v. Harris*, 67 Iowa, 684. Or is a mere revocable indulgence. *Newell v. Hamer*, 4 How. (Miss.) 684; 35 Am. Dec. 415; *Cates v. Theyer*, 93 Ind. 156. Or the creditor accepts additional security. *Brengle v. Bushey*, 40 Md. 141; 17 Am. Rep. 586; *Burke v. Oruger*, 8 Tex. 66; 58 Am. Dec. 102. Or the creditor merely forbears to sue the debtor. *Ashby v. Johnston*, 23 Ark. 163; 79 Am. Dec. 102; *Wasson v. Hodshire*, 106 Ind. 26; *Banks v. State*, 62 Md. 88; *Uplike v. Lane*, 78 Va. 132; *McKechnie v. Ward*, 56 N. Y. 541; 17 Am. Rep. 281; *Cope v. Smith*, 8 Serg. & R. 110; 11 Am. Dec. 532; *Hunt v. Bridgham*, 2 Pick. 581; 13 Am. Dec. 458; *Sneed v. White*, 3 J. J. Marsh. 525; 30 Am. Dec. 175; *U. S. v. Simpson*, 3 Penr.

& W. 437; 24 Am. Dec. 331; *Com. Bank v. French*, 31 Pick. 436; 32 Am. Dec. 290; *Cooper v. Wilcox*, 2 Dev. & B. (Eq.) 90; 33 Am. Dec. 636; *Blandford v. Barger*, 9 Dana, 22; 33 Am. Dec. 519; *Johnson v. Planters Bank*, 4 Smedes & M. 165; 43 Am. Dec. 480; *Carter v. Jones*, 5 Ired. (Eq.) 196; 49 Am. Dec. 425; *Burke v. Oruger*, 8 Tex. 66; 58 Am. Dec. 102; *Minier v. Bank*, 23 Ala. 763; 58 Am. Dec. 315; *Wright v. Yell*, 13 Ark. 506; 58 Am. Dec. 337; *Cook v. Southwick*, 9 Tex. 615; 60 Am. Dec. 181. Even though the surety has requested him to sue. *Smith v. Tunno*, 1 McCord Ch. 443; 16 Am. Dec. 618; *Smith v. Freyler*, 4 Mont. 389; 47 Am. Rep. 358; *Ingels v. Suttill*, 35 Kan. 444; *Pintard v. Davis*, 21 N. J. (L.) 632; 47 Am. Dec. 172; *Caston v. Dunlap*, Rich. (Eq.) 77; 23 Am. Dec. 194; *Bank v. Dixon*, 4 Vt. 537; 24 Am. Dec. 640; *Taylor v. Beck*, 13 Ill. 376; *Inkaler v. Bank*, 30 Mich. 143; *Dane v. Corduan*, 24 Cal. 157; 35 Am. Dec. 53; *Baker v. Marshall*, 16 Vt. 532; 42 Am. Dec. 536; *Bull v. Allen*, 19 Conn. 101; *Dillon v. Russell*, 5 Neb. 484.

³ *Baird v. Rice*, 1 Call. 18; 1 Am. Dec. 497; *Tremper v. Hemphill*, 8 Leigh, 623; 31 Am. Dec. 673; *Bowen v. Cobb*, 31 Fed. Rep. 678. Unless B in his agreement, expressly reserves his right against C. *Kearaley v. Cole*, 16 M. & W. 135; *Kenworthy v. Sawyer*, 125 Mass. 28; *Mueller v. Dobschuets*, 69 Ill. 175; *Jones v. Sarchett*, 61 Ia. 320; *Hubbell v. Carpenter*, 3 N. Y. 171; *Morgan v. Smith*, 70 N. Y. 537.

⁴ *New Hamp. Sav. Bk. v. Colcord*, 15 N. H. 119; 41 Am. Dec. 636; *Blydenburgh*

tension of the time of payment or performance is such a material alteration of the contract as will discharge the surety whether he is prejudiced by the extension or not.¹ And, in fine, if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.²

Where a surety guarantees the due performance of an office, employment or agency, any material alteration in the duties stipulated for, without consent of the surety, discharges him from liability.³ But the undertaking of an additional office or other duties, unless materially affecting or altering the former, does not affect the guaranty, unless the surety has stipulated against it.⁴

Agreements or dealings between creditor and debtor to the prejudice of sureties of the debtor stand on a slightly different footing to those mentioned in the last section, the

v. Bingham, 38 N. Y. 371; 98 Am. Dec. 49; *Baker v. Briggs*, 8 Pick. 121; 19 Am. Dec. 311; *Bank v. Matson*, 26 Mo. 243; 73 Am. Dec. 208; *Dixon v. Ewing*, 3 Ohio, 230; 17 Am. Dec. 590; *Bank v. Fordyce*, 9 Pa. St. 275; 49 Am. Dec. 561; *Springer v. Toothaker*, 43 Me. 331; 69 Am. Dec. 66; *Robeson v. Roberts*, 20 Ind. 153; 83 Am. Dec. 306; *Sample v. Cochran*, 34 Ind. 534; *Nelson v. Minch*, 23 Minn. 314; *Gordon v. Moore*, 44 Ark. 349; 51 Am. Rep. 606; *Lichtenhaler v. Thompson*, 13 S. & R. 157; 15 Am. Dec. 581.

¹ *Brown v. Wright*, 7 T. B. Mon. 296; 18 Am. Dec. 190; *Grafton Bank v. Woodward*, 5 N. H. 99; 20 Am. Dec. 566; *Bank v. Dixon*, 4 Vt. 587; 24 Am. Dec. 640; *Everett v. U. S.*, 6 Port. 166; 30 Am. Dec. 586; *Bangs v. Strong*, 7 Hill, 250; 42 Am. Dec. 64; *King v. State Bank*, 9 Ark. 185; 47 Am. Dec. 739; *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673; *Dickerson v. Ripley Co.*, 6 Ind. 123; 63 Am. Dec. 373; *Place v. McIlvain*, 38 N. Y. 96; 97 Am. Dec. 777; *Back v. Zimmerman*, 105 Ind. 405; *Williams v. Scott*, 33 Ind. 405; *Glenn v. Morgan*, 23 W. Va.

467; *Oberndorf v. Union Bank*, 31 Md. 126; 1 Am. Rep. 81; *Butler v. Hamilton*, 2 Deasau, 236; 2 Am. Dec. 692; *Post v. Losey*, 111 Ind. 75; 60 Am. Rep. 677; *Kennebec Bk. v. Tuckerman*, 5 Me. 130; 17 Am. Dec. 209.

² *Insurance Co. v. Scott*, 81 Ky. 540; *Railroad Co. v. Gow*, 59 Ga. 683; *Gradle v. Hoffman*, 105 Ill. 147; *Clow v. Duty Coal Co.*, 98 Pa. St. 433; *White v. Life Assn. of America*, 63 Ala. 419; *Walsh v. Colquitt*, 64 Ga. 746.

³ *Mumford v. R. R. Co.*, 3 Lea, 393; 31 Am. Rep. 616; *Manuf. Nat. Bank v. Dickerson*, 41 N. J. (L.) 443; 23 Am. Rep. 237; *Home Sav. Bank v. Traube*, 75 Mo. 199; 43 Am. Rep. 493; *City of Lafayette v. James*, 92 Ind. 240; 47 Am. Rep. 140; *Mayor v. Kelly*, 98 N. Y. 467; 50 Am. Rep. 639; *Singer Mfg. Co. v. Hibbs*, 21 Mo. App. 374; *Victor Sewing Machine Co. v. Langham*, 9 Biss. 183; *Roberts v. Donovan*, 70 Cal. 106; *Whelen v. Boyd*, 114 Pa. St. 228; *Ryan v. Morton*, 65 Tex. 258.

⁴ *Rollstone Bk. v. Carleton*, 126 Mass. 228; *Lane's Appeal*, 112 Pa. St. 497.

improper transaction being valid in itself but avoiding the contract of suretyship.

§ 304. **Frauds upon Marital Rights.**—Secret and voluntary conveyances of her property made by a woman engaged to marry may be set aside on the husband's subsequent application, as a fraud upon his marital rights,¹ except where her object was to reasonably provide for her children by a former marriage.² But if the husband knew of the conveyance before he married her and chose nevertheless to do so, he has no remedy.³ For the same reason the secret conveyance just before marriage of the husband's property would be a fraud on the wife,⁴ to the extent at least of her dower in the real property conveyed.⁵

§ 305. **Contracts Influencing Corporate Action.**—Contracts which have for their object an improper influence over corporate action are a fraud either on the stockholders of the company which are entitled to have the free unbiased services of its officers working in the best interest of the company, or, in the case of a public or quasi-public corporation, on the public also. Therefore all contracts with corporations by which its directors or agents are to receive any secret and private advantage are illegal and void.⁶

¹ 2 Kent's Com. 174, 12 ed.; *Spencer v. Spencer*, 8 Jones (Eq.), 404; *Tucker v. Andrews*, 13 Me. 124; *Williams v. Oarll*, 9 N. J. (Eq.) 548; *Freeman v. Hartman*, 45 Ill. 57; 93 Am. Dec. 193; *Baker v. Jordan*, 78 N. C. 148; *Hall v. Carmichael*, 8 Baxt. 211; 35 Am. Rep. 696; *Manes v. Durant*, 2 Rich. (Eq.) 404; 46 Am. Dec. 65.

² *Ramsay v. Joyce*, 1 McMull 236; *Butler v. Butler*, 21 Kas. 521.

³ *Cheshire v. Payne*, 16 B. Mon. 618; *Terry v. Hopkins*, 1 Hill, Ch. 1; 1 Story's (Eq.) Jur. Sec. 403; *Cole v. O'Neill*, 3 Md. Ch. 174; *O'Neill v. Cole*, 4 Md. 107; *Fletcher v. Ashley*, 6 Gratt. 332; *Charles v. Charles*, 8 Gratt. 486; 56 Am. Dec. 155.

⁴ *Schouler on Husband & Wife*, 357; *Thayer v. Thayer*, 14 Vt. 107; 39 Am. Dec.

211; *Kelly v. McGrath*, 70 Ala. 75; 45 Am. Rep. 75. But see *Hamilton v. Smith*, 57 Iowa, 15; 42 Am. Rep. 39.

⁵ *Petty v. Petty*, 4 B. Mon. 215; 39 Am. Dec. 501; *Smith v. Smith*, 6 N. J. (Eq.) 515; *Smith v. Smith*, 13 Cal. 217; 73 Am. Dec. 533; *Tate v. Tate*, 1 Dev. & B. (Eq.) 22; *Littleton v. Littleton*, 1 Dev. & B. 327; *Pomeroy v. Pomeroy*, 54 How. Pr. 223; *Dearmond v. Dearmond*, 10 Ind. 191; *Cranson v. Cranson*, 4 Mich. 230; 66 Am. Dec. 534; *Brown v. Bronson*, 35 Mich. 415; *Youngs v. Carter*, 10 Hun, 194; *Chandler v. Hollingsworth*, 3 Del. Ch. 99.

⁶ *Pacific R. Co. v. Seely*, 45 Mo. 212; *Fuller v. Dame*, 18 Pick. 472; *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 63 Ill. 300; *Thomes v. R. R. Co.*, 1 McCray, 393; *Bill v. West Union Tel. Co.*, 16

And as it tends to fraud for the officers of a corporation to speculate in claims against it, a contract by such officers for the purchase of a claim against it is unenforceable;¹ so is an agreement with the president of a bank to buy shares on condition that the purchaser is made cashier;² so is a promise of a trustee of a corporation to resign for a pecuniary consideration.³ An agreement to donate property or subscribe money to a railroad company on condition that its depot shall be located at a particular place seems to be valid, where it does not restrict the company from locating a depot elsewhere or from rendering such other accommodation as the public convenience may require.⁴ Where the agreement has this element, however, it is clearly illegal, as for instance an agreement in consideration of a grant of a right of way that the railroad would erect and maintain its depot on the grantor's land and not build any other within a certain distance of it;⁵ or that the railroad would maintain its principal place of business at a certain place "and not build a side track to its main line in the town of E."⁶

§ 306. Sales at Auction — Agreements to Defraud Bidders. — To raise the price of an article put up at public

Fed. Rep. 14; *Bennett v. St. Louis Car Co.*, 19 Mo. App. 349.

¹ *McDonald v. Houghton*, 70 N. C. 393.

² *Noel v. Drake*, 28 Kan. 265; *Guernsey v. Cook*, 120 Mass. 501.

³ *Forbes v. McDonald*, 54 Cal. 98.

⁴ *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55; *St. Joseph & Denver City, etc., R. R. Co. v. Ryan*, 11 Kan. 602; *International R. R. Co. v. Dawson*, 62 Tex. 280; *Taylor v. Cedar Rapids R. R. Co.*, 25 Iowa, 371; *Texas, etc., R. R. Co. v. Robards*, 60 Tex. 549; *Swartout v. Michigan Air Line R. R.* 24 Mich. 389; *Harris v. Roberts*, 12 Neb. 631; *Williamson v. Chicago, etc., R. Co.*, 58 Ia. 126; *First Nat. Bk. v. Hendrie*, 49 Ia. 402; *Cumberland, etc., R. Co. v. Babb*, 9 Watts. 458; *McClure v. Mo., etc., Gulf R. Co.*, 9 Kan. 373; *Railroad Co. v. Ralston*, 41 Ohio St. 578;

Fuller v. Dame, 18 Pick. 472. There are decisions, however, holding that subscriptions to railroad companies conditioned on their locating a depot at a given point are invalid. *Holladay v. Patterson*, 5 Oregon, 182; *Pacific R. R. Co. v. Seely*, 45 Mo. 212; *Marsh v. Fairbury*, 64 Ill. 414. A contract to pay money in consideration that the company will build its road to a certain point is valid. *First Nat. Bank v. Hendrie*, 49 Iowa, 402; 31 Am. Rep. 158.

⁵ *St. Jo., etc., R. R. Co. v. Ryan*, 11 Kan. 602; 15 Am. Rep. 357; *Marsh v. R. R. Co.*, 64 Ill. 414; 16 Am. Rep. 564; *St. Louis, etc., R. R. Co. v. Mathers*, 71 Ill. 593; 22 Am. Rep. 122; *Williamson v. R. R. Co.*, 53 Iowa, 126; 36 Am. Rep. 206.

⁶ *Pueblo, etc., R. R. Co. v. Taylor*, 6 Col. 1; 45 Am. Rep. 512.

auction by fictitious bids is a fraud on the buyer for which the sale will be set aside on his application,¹ although it is not illegal to place a limit on the price below which the property must not be sold, and to withdraw it if it does not reach that figure,² nor to employ a person to make fictitious bids for the sole purpose of preventing a sacrifice of the property offered for sale.³ Agreements, therefore, made between the auctioneer or the owner of the property and a third party by which he is to act as a "puffer," are illegal and cannot be enforced on either side: the puffer could not recover the compensation promised for his services, and the purchaser on discovering the fraud may return the property or refuse to be bound by his bid.⁴ Nor could the owner of the property recover it from the purchaser as being obtained on an illusory bid.⁵

§ 307. Sales at Auction—Agreements to Defraud Owner.—Combinations and agreements between parties with a view of preventing fair competition at an auction sale are illegal and void as a fraud on the owner of the property,⁶

¹ *Veasie v. Williams*, 8 How. 135; *Wheeler v. Collier*, 1 Wood & M. 125; *Moncrief v. Goldsborough*, 4 Har. & McH. 233; 1 Am. Dec. 407; *Troughton v. Johnston*, 2 Hayw. 328; 2 Am. Dec. 626; *Steele v. Ellmaker*, 11 Serg. & R. 86; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Fisher v. Hersey*, 17 Hun. 370; *Towle v. Leavitt*, 23 N. H. 300; 55 Am. Dec. 195; *Baham v. Bach*, 13 La. 287; 33 Am. Dec. 531; *Hinde v. Pendleton*, Wythe, 144; *Morehead v. Hunt*, 1 Dev. (Eq.) 65; *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Donaldson v. McRoy*, 1 Browne, 346; *Bank of Metropolis v. Sprague*, 20 N. J. (Eq.) 159; *Pennock's Appeal*, 14 Pa. St. 446; 53 Am. Dec. 561; *Bailey v. Morgan*, Busb. 332; *Whitaker v. Bond*, 63 N. C. 290; *Staines v. Shore*, 16 Pa. St. 300; 55 Am. Dec. 493; *Curtis v. Aspinwall*, 114 Mass. 187; 19 Am. Rep. 323; *Peck v. List*, 23 W. Va. 338; 48 Am. Rep. 398; *McDonnell v. Sims*, 6 Ired. (Eq.) 278; *Reynolds v. Dechaums*, 24 Tex. 174; 76 Am. Dec. 101; *Woods v.*

Hall, 1 Dev. (Eq.) 411; *Martin v. Ranlett*, 6 Rich. 541; *Davis v. Petway*, 3 Head. 667; 75 Am. Dec. 789; *Miller v. Baynard*, 2 Houst. 559; 83 Am. Dec. 168.

² *Towle v. Leavitt*, 23 N. H. 300; 55 Am. Dec. 195; *Wolfe v. Lyster*, 1 Hall, 146; *Hasul v. Dunham*, 1 Hall, 665; *Williams v. Poor*, 3 Oranch, C. C. 231; *Steele v. Ellmaker*, 11 Serg. & R. 86.

³ *Wolfe v. Lyster*, 1 Hall, 146; *Jenkins v. Hogg*, 2 Tread. Const. 821; *Reynolds v. Dechaums*, 24 Tex. 174; 76 Am. Dec. 101; *Steele v. Ellmaker*, 11 Serg. & R. 86; *Miller v. Campbell*, 3 A. K. Marsh, 523; *Lee v. Lee*, 19 Mo. 420; *Davis v. Petway*, 3 Head. 667; 75 Am. Dec. 789; *Miller v. Baynard*, 2 Houst. 559; 83 Am. Dec. 168.

⁴ *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 493; *McDowell v. Simms*, Busb. Eq. 130; 57 Am. Dec. 595.

⁵ *Troughton v. Johnston*, 2 Hayw. 328; 3 Am. Dec. 626.

⁶ *Dudley v. Odom*, 5 S. C. 181; 22 Am. Rep. 6; *Doolia v. Ward*, 6 Johns. 194;

though if the intention of the parties be simply to obtain small quantities of the property which they desire, the lots offered being larger than any one of them alone is able or desires to purchase, the rule is different.¹ In *Phippen v. Stickney*,² the court say: "An agreement between A and B that A will permit B to become the purchaser of certain property about to be offered at sale at public auction and that A shall participate with B in the benefits of the purchase, will or will not be fraudulent as the circumstances of the case show innocence of intention or a fraudulent purpose in making such agreement. Where such arrangement is made for the purpose and with the view of preventing fair competition and by reason of want of bidders to depress the price of the article offered for sale below the fair market value, it will be illegal and may be avoided as between the parties as a fraud upon the rights of the vendor. But on the other hand if the arrangement is entered into for no such fraudulent purpose but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale and not an entire lot and induced by any other reasonable and honest purpose, such agreement will be valid and binding." And an association formed for the purpose of bidding at an auction sale is lawful, and may become the

Wilber v. Howe, 8 Johns. 444; *Wooton v. Hinkle*, 20 Mo. 290; *Hook v. Turner*; 22 Mo. 333; *Ray v. Mackin*, 100 Ill. 246; *Hunter v. Pfeiffer*, 108 Ind. 197; *Atcheson v. Mallon*, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 592; *Loyd v. Malone*, 23 Ill., 43; 74 Am. Dec. 179; *Hawley v. Cramer*, 4 Cow. 718; *Martin v. Ranlett*, 5 Rich. 541; 57 Am. Dec. 770; *Jones v. Caswell*, 8 Johns. Cas. 29; 2 Am. Dec. 333; *Thompson v. Davies*, 13 Johns. 112; *Brisbane v. Adams*, 3 N. Y. 130; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Gardiner v. Morse*, 25 Me. 140; *Troup v. Sherwood*, 4 Johns. Ch. 228; *Gullick v. Ward*, 10 N. J. (L.) 87; 81 Am. Dec. 339; *Slingluff v. Eekie*,

24 Pa. St. 473; *Dick v. Lindsay*, 2 Grant Cas. 431; *Hook v. Turner*, 22 Miss. 333; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Dudley v. Little*, 2 Ohio, 504; 15 Am. Dec. 575; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; 46 Am. Dec. 53; *Platt v. Oliver*, 1 McLean, 295.

¹ *Marle v. Garrison*, 33 N. Y. 14; *Wicker v. Hoppoch*, 6 Wall. 94; *Garrett v. Moss*, 20 Ill. 549; *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Switzer v. Skies*, 8 Ill. 529; 44 Am. Dec. 723; *Smull v. Jones*, 1 Watts & S. 129; *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134; *National Bk. v. Sprague*, 20 N. J. Eq. 159.

² 3 Mete. 338.

purchaser, unless formed for the purpose of preventing competition.¹

(c) *Contracts Against Public Policy.*

§ 308. *Introductory.* — Public policy is a phrase of frequent occurrence in the law reports and yet not capable of any very exact definition. It would be difficult to find its earliest application; most likely agreements which tended to promote litigation or to restrain trade² or marriage were the first to elicit the principle that the courts would look to the interests of the public in giving efficacy to contracts.³ Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, and it is said by a recent authority⁴ that the doctrine of public policy originated in the endeavor to elude their binding force. Whatever may have been the origin of the doctrine, it has been applied very frequently, and not always with the happiest results, during more than a century. Modern decisions, however, while maintaining the duty of the courts to consider the public advantage, have tended to limit the sphere within which this duty has been exercised, and the modern view of the subject is well expressed by Jessel, M. R., in *Printing Company v. Sampson*,⁵ where he says: “It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy

¹ *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Kearney v. Taylor*, 15 How. 494.

² See *post*, § 324.

³ *Anson Contr.* 183.

⁴ *Pollock on Contr.* 272; *Anson* is of a contrary opinion. *Anson Contr.*, 183.

⁵ 19 Eq. 462.

to consider that you are not lightly to interfere with the freedom of contract." Nevertheless it is well settled that there are certain kinds of contracts which are illegal, not because they are in breach of statutes or of express rules of law but because they infringe certain tendencies or principles of the law, and such agreements are spoken of as being against the policy of the law or public policy.¹

A contract is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society.² But where a contract belongs to that class, it will be declared void, although, in that particular instance, no injury to the public may have resulted.³ What constitutes public policy, and what contravenes it, is a question of law for the court, and not one of fact for the jury.⁴

Agreements of this character may be classified under seven heads, viz.:

I. Agreements which tend to injure the public service.
See *post*, §§ 309–314.

II. Agreements which tend to obstruct the course of public justice. See *post*, §§ 315–316.

III. Agreements which tend to encourage litigation.
See *post*, §§ 317–318.

¹ *Jerome v. Bigelow*, 66 Ill. 452; *Gillett v. Logan County*, 67 Ill. 257; *Paton v. Stewart*, 78 Ill. 481; *Craft v. McConoughy*, 79 Ill. 346; *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68; *Ohio, etc., Ins. Co. v. Merchants', etc., Ins. Co.*, 11 Humph. 1; 53 Am. Dec. 742; *Blasdel v. Fowle*, 120 Mass. 447; 21 Am. Rep. 533; *Scudder v. Andrews*, 2 McLean, 464; *Milne v. Huber*, 3 McLean, 212; *Wooten v. Miller*, 15 Miss. 380; *Adams v. Rowan*, 16 Miss. 624; *Davis v. Holbrook*, 1 La. Ann. 178; *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 833; *City Bank v. Perkins*, 29 N. Y. 554; 86 Am. Dec. 332; *Schmidt v. Barker*, 17 La. Ann. 261; 87 Am. Dec. 527; *Bowman v. Gonegal*, 19 La. Ann. 328; 92 Am. Dec. 537; *Norton*

v. Dawson, 19 La. Ann. 464; 92 Am. Dec. 548; *Holcomb v. Weaver*, 136 Mass. 285; *Cumpston v. Lambert*, 18 Ohio, 81; 51 Am. Dec. 442; *Pickett v. School Dist.*, 25 Wis. 551; 3 Am. Rep. 105; *Bledsoe v. Jackson*, 4 Sneed, 429; *Mercier v. Mercier*, 50 Ga. 546; 15 Am. Rep. 694; *Hamilton v. Hamilton*, 89 Ill. 349; *Ray v. Mackin*, 100 Ill. 246; *Chicago, etc., Co. v. Gas Light Co.*, 121 Ill. 530; *Cothran v. Ellis*, 125 Ill. 496.

² *Peterson v. Christensen*, 20 Minn. 377.

³ *Fireman's Ch. Assn. v. Berghaus*, 13 La. Ann. 209.

⁴ *Smith v. Du Boise*, 78 Ga. 418; 6 Am. St. Rep. 280.

IV. Agreements contrary to good morals. See *post*, § 319.

V. Agreements which affect the freedom or security of marriage. See *post*, §§ 320–323.

VI. Agreements which restrain the freedom of trade. See *post*, §§ 324–331.

VII. Agreements which affect the security of property and life or one's duty towards others. See *post*, §§ 332–336.

§ 309. **Agreements to Influence Legislative Action.** — What are called “lobbying contracts,” *i. e.*, agreements to render services in securing legislative action through personal influence with the legislators, and through other corrupt and objectionable means, are illegal and void;¹ as for example, a contract for general services in procuring legislation;² or an agreement to prevent legislative investigation into the affairs of a railroad company;³ or an agreement to grant certain privileges in consideration of the withdrawal of opposition to the passage of an act through the legislature⁴ or an agreement to pay a delegate in Congress for services rendered by him in securing the payment of a claim required to be authorized by Congress.⁵ In *Mills v. Mills*⁶ it was held that a contract is void as against public policy, and will not be enforced, where the consideration is that one of the parties thereto would give “all the aid in his

¹ *Marshall v. R. R. Co.*, 16 How. 314; *Trist v. Child*, 21 Wall. 441; *Mills v. Mills*, 40 N. Y. 573; *Frost v. Belmont*, 6 Allen, 152; *Howell v. Fountain*, 3 Ga. 176; 46 Am. Dec. 415; *Marsh v. Russell*, 2 Lans. 340; *Coppell v. Hall*, 7 Wall. 542; *Pratt v. Foot*, 6 Conn. 332; *McGuire v. Smock*, 42 Ind. 1; 13 Am. Rep. 336; *Buck v. Bank*, 27 Mich. 298; 15 Am. Rep. 189; *Nichols v. Mudgett*, 33 Vt. 546; *Elkhart Co. Lodge v. Crary*, 98 Ind. 238; 49 Am. Rep. 746; *Oscanyar v. Arms Co.*, 108 U. S. 24.

² *Weed v. Black*, 2 McAr. 268; 29 Am.

Rep. 618; *Trist v. Child*, 21 Wall. 441; *Clippinger v. Hepbaugh*, 5 Watts & S. 815; 40 Am. Dec. 519; *Frost v. Belmont*, 6 Allen, 152; *Gill v. Williams*, 12 La. Ann. 219; 68 Am. Dec. 767; *Powers v. Skinner*, 34 Vt. 274; 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200; 68 Am. Dec. 55; *Coquillard v. Bearss*, 21 Ind. 479; 33 Am. Dec. 262.

³ *Usher v. McBratney*, 3 Dill, 385.

⁴ *Pingry v. Washburn*, 1 Aiken, 264; 15 Am. Dec. 675.

⁵ *Weed v. Black*, 2 McAr. 268; 29 Am. Rep. 618.

⁶ 40 N. Y. 543; 100 Am. Dec. 535.

power, spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law" of a bill introduced into the legislature.

§ 310. **Agreements to Influence Administrative and Executive Action.** — So agreements are void whose objects or the services to be rendered under which, are to procure from any department of the government, national, State or municipal,¹ contracts in another's favor, or any kind of official action;² as for example an agreement to endeavor to obtain from a cabinet officer a valuable contract for supplying arms to the government,³ or an agreement to use one's influence with a municipal council to procure a lease;⁴ or an agreement not to compete with a person in making bids for the carrying of the mail or other government contract or to share in the result,⁵ or an agreement to secure the removal or location of a public building;⁶ or an agreement guaranteeing to pay a sum of money to certain persons provided they will petition the common council of a city for street improvements;⁷ or a promise to pay a sum of money to a mail contractor if he will repudiate his contract for carrying the mail⁸ or a promise to a collector of taxes in consideration that he will forbear to collect the taxes in the manner required by law,⁹ or a con-

¹ *Oscanyar v. Arms Co.*, 103 U. S. 261.

² *Cook v. Shipman*, 24 Ill. 614; 51 Ill. 316; *Meguire v. Corwine*, 101 U. S. 108; *Devlin v. Brady*, 36 N. Y. 531; *Elkhart Co. v. Craig*, 98 Ind. 238; *Oaton v. Stewart*, 78 N. C. 357; *Spence v. Harvey*, 22 Cal. 336; 83 Am. Dec. 69.

³ *Providence Tool Co. v. Norris*, 2 Wall. 45.

⁴ *Wall v. Charlick*, 8 N. Y. Leg. Obs. 230; *Pease v. Walsh*, 49 How. Pr. 269.

⁵ *Hannah v. Fife*, 27 Mich. 173; *Gulick v. Ward*, 9 N. J. (L.) 87; 18 Am. Dec. 389; *King v. Winants*, 71 N. C. 469; 17 Am. Rep. 11; *Swan v. Chorpeneing*, 20 Cal. 182; *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am.

Rep. 678; *Gibbs v. Smith*, 115 Mass. 592; *Marsh v. Russell*, 66 N. Y. 288.

⁶ *County Commers. v. Jones*, 1 Ill. 237; *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422; *Spencer v. Harvey*, 22 Cal. 336; 83 Am. Dec. 69. In Kansas a contract by which certain persons agreed to pay rent for a building in which a post-office was located, for the purpose of keeping the office in that particular locality for their convenience was held against public policy. *Woodman v. Innes*, 27 Pac. Rep. 125.

⁷ *McGuire v. Smock*, 42 Ind. 1; 18 Am. Rep. 383.

⁸ *Weld v. Lancaster*, 56 Me. 453.

⁹ *Packard v. Tisdale*, 50 Me. 376.

tract to procure a return of duties by an officer in the custom-house for a share of the amount returned;¹ or a contract to endeavor to procure for a compensation a pardon from the governor for a convict;² or a note given to procure a party to sign a petition for executive clemency.³

§ 311. **Appointment of Public Officers.**—Agreements which have for their object the purchase or sale of a public office are illegal, for the public has a right to some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices.⁴ So all agreements are void whose object is to influence the election or appointment of a person to a public office;⁵ as an agreement to influence the governor of a State to appoint a certain person to a public office,⁶ or a contract whereby, in consideration of A's procuring B's appointment as special counsel in certain causes against the United States, and aiding him in managing the defense of them, B agrees that he will pay A one-half of the fee which he may receive from the government.⁷

§ 312. **Agreements Influencing Elections.**—If there are any contracts, it has been well said,⁸ upon which courts should put the stamp of their disapprobation, they are those curtailing or tending to curtail a free exercise of the elective franchise. Therefore agreements for a money consideration to use one's influence to promote the elec-

¹ *Satterlee v. Jones*, 3 Duer, 102.

² *Hatzfeld v. Gulden*, 7 Watts, 152; 32 Am. Dec. 750; *Kribben v. Haycraft*, 26 Mo. 396; *Willey v. Collier*, 7 Md. 273; 61 Am. Dec. 346. *Contra*, *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329. See *Thompson v. Wharton*, 7 Bush, 563; 3 Am. Rep. 308.

³ *Buck v. Bank*, 27 Mich. 302; *Haines v. Lewis*, 54 Iowa, 301; 37 Am. Rep. 202.

⁴ *Outen v. Bodes*, 3 A. K. Marsh, 432; 13 Am. Dec. 193; *Morse v. Ryan*, 26 Wis. 356; *Gray v. Hook*, 4 N. Y. 447; *Hall v.*

Gavit, 18 Ind. 390; *Groton v. Waldoborough*, 11 Me. 306; 26 Am. Rep. 531; *Engle v. Chipman*, 51 Mich. 594; *Waldron v. Evans*, 1 Dak. 11.

⁵ *Gray v. Hook*, 4 N. Y. 449; *Nichols v. Mudgett*, 32 Vt. 546; *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422; *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548.

⁶ *Faurie v. Morin*, 4 Mart. (L.) 39; 6 Am. Dec. 701.

⁷ *Meguire v. Corwine*, 101 U. S. 108.

⁸ *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548.

tion of another to a public office,¹ or a promise to pay for services rendered by another as a canvasser at a primary election to secure the promisor's nomination for an office;² or a promise to a voter to pay his traveling expenses, or to remunerate him for his loss of time;³ or a wager between two voters upon the result of an election;⁴ or an agreement to pay money in consideration of abandoning a petition against the return of a member for bribery,⁵ have all been held to be invalid.

§ 313. *Exceptions to the Foregoing Rules.*—The principles stated in the foregoing sections must not be thought to apply to agreements for purely professional services to be rendered openly, as the attorney or agent of another, in the way of preparing papers, presenting evidence and submitting arguments before public bodies, committees or heads of departments of the government. A contract for contingent compensation for professional services of a legitimate character in prosecuting a claim against the United States pending in one of the executive departments is not illegal;⁶ nor is a contract to make a public argument before the legislature or its committees for or against an act;⁷ nor a contract whereby one agrees for hire to work for the passage of bills by the legislature, or to place before the governor the arguments and petitions in favor of the pardon of a convict or to canvass and make speeches for a candidate for a public office provided he does not conceal his interest in the matter, but lets it be known and understood by the persons whose judgment he undertakes to influence.⁸ In such cases no fraud or wrong can arise where

¹ *Gaston v. Drake*, *supra*; *Nicholls v. Mudgett*, 32 Vt. 546; *Swayze v. Hall*, 8 N. J. (L.) 54; 14 Am. Dec. 399.

² *Keating v. Hyde*, 23 Mo. App. 555.

³ *Cooper v. Slade*, 6 El. & B. 447; *Simpson v. Yeend*, L. R. 4 Q. B. 626.

⁴ *Allen v. Hearn*, 1 Term Rep. 56. See *ante* § 284.

⁵ *Coppock v. Bower*, 4 Mees. & W. 361.

⁶ *Stanton v. Embrey*, 93 U. S. 548.

⁷ *Bryan v. Reynolds*, 5 Wis. 200; 68 Am. Dec. 55.

⁸ *Miles v. Thorne*, 38 Cal. 335; 99 Am. Dec. 384.

all parties, the government officers and agents and the public, fully understand the relation of each to the subject-matter of the transaction. The wrong which the courts strike down is the fraud practiced by a person's attempting to exert his influence with the administrative agents of the government or the people and give apparently disinterested advice, whereas he is in fact the person chiefly interested in the success of his undertaking.¹

§ 314. *Salaries of Public Officers.*—The salary or emoluments of a public officer cannot be sold or assigned by the holder, and any contract or agreement to do so is void as against public policy;² as for example a contract by a clerk of a court to assign all the fees of his office to pay a debt he owes.³ “It is fit,” said an English judge, “that the public servants should retain the means of a decent subsistence and not be exposed to the temptations of poverty.”⁴

Even more reprehensible are agreements to assign a part of one's compensation as a public officer in consideration of an unlawful agreement on the part of the assignee; as, for example, an agreement made before an election to share the salary and fees of an office in consideration of the plaintiff's using his influence to elect the defendant to such office;⁵ or an agreement by an applicant for an office to divide the receipts, in consideration that a rival applicant will withdraw or has withdrawn,⁶ or shall aid the other in obtaining the office.⁷

§ 315. *Agreements Obstructing Public Justice.*—Upon the ground of public policy, any agreement having a ten-

¹ *Wylie v. Cox*, 15 How. 415; *Taylor v. Bemis*, 110 U. S. 42; *Sedgwick v. Stanton*, 14 N. Y. 289; *Workman v. Campbell*, 46 Mo. 306.

² *Palmer v. Bate*, 2 B. & B. 673; *Barwicke v. Reade*, 1 H. Bl. 637; *Bliss v. Lawrence*, 58 N. Y. 442; *Bangs v. Dunn*, 66 Cal. 72; *Beal v. McVicker*, 8 Mo. App. 202.

³ *Field v. Chipley*, 79 Ky. 260; 42 Am. Rep. 215.

⁴ *Foster v. Wells*, 8 M. & W. 149.

⁵ *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548.

⁶ *Hunter v. Nolf*, 71 Pa. St. 229; *Martin v. Wade*, 37 Cal. 169; *Glover v. Taylor*, 38 La. Ann. 634.

⁷ *Gray v. Hook*, 4 N. Y. 449.

dency to pervert or influence the course of public justice is illegal and void.¹ As falling under this rule the following have been held invalid, viz.: an agreement to indemnify an officer for the voluntary escape of a prisoner in his charge² or for releasing a person from arrest;³ an agreement to procure witnesses to swear to a particular fact;⁴ an agreement to suppress evidence at a trial;⁵ or an agreement that a defendant in a proceeding for a divorce shall withdraw his or her papers, and make no defense in the case;⁶ or a contract by a wife to pay her solicitors one-half of alimony to be recovered by her in a suit for divorce as compensation for their services in such suit;⁷ an agreement by an attorney to procure, for a contingent fee, the quashing of a criminal conviction;⁸ a promise to pay a person for endeavoring to induce the prosecutors of a criminal case to discontinue it,⁹ or for endeavoring to prevent the finding of an indictment, or if it is found, endeavoring to get the authorities to dismiss it;¹⁰ a contract to "use every legal and proper endeavor to have the criminal prosecutions dismissed" against the promisee;¹¹ a contract between attorneys and liquor dealers that they will defend for a stated monthly compensation all cases brought against them for violations of the prohibitory liquor law;¹² a note, part of the consideration for which was an agreement to use influence to secure the acquittal of one prosecuted for a felony;¹³ or an agreement by which one party receives a sum of money to become the bail of another, accused of felony, in order

¹ *Collins v. Blantern*, 2 Wils. 341; 1 Smith's Lead. Cas. 490; *Bierbaur v. Wirth*, 10 Biss. 60.

² *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232.

³ *Webber v. Blunt*, 19 Wend. 188; 32 Am. Dec. 445.

⁴ *Patterson v. Donner*, 48 Cal. 369.

⁵ *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370. An agreement to give information in respect to evidence is not necessarily illegal. *Id.* *Wellington v. Kelly*, 84 N. Y. 543; *Harris v. More*, 70 Cal. 502.

⁶ *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

⁷ *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836.

⁸ *Ormerod v. Dearman*, 100 Pa. St. 561; 45 Am. Rep. 391.

⁹ *Rhodes v. Neal*, 64 Ga. 704; 37 Am. Rep. 93.

¹⁰ *Barron v. Tucker*, 53 Vt. 338; 35 Am. Rep. 684.

¹¹ *Avenbeck v. Hall*, 14 Bush. 505.

¹² *Bowman v. Phelps*, 41 Kan. 364.

¹³ *Richetts v. Harvey*, 106 Ind. 564.

that a defendant may be released from custody so as to escape trial.¹

§ 316. **Compounding Offenses against the Law.**—The compromise or compounding of felonies, misdemeanors or any public offenses is illegal, and agreements involving such compromises, either in whole or in part, are void;² as, for example, a bond, a deed, or other agreement, the consideration of which is not to prosecute for an offense which has been committed.³ “You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself.”⁴

But a person whose property has been stolen or whose rights have been interfered with may compromise with the wrong-doer if nothing is done tending to suppress the criminal prosecution,⁵ but if in part consideration of such settlement it is agreed that the public prosecution of some offense against the State shall be stayed, the agreement is void *in toto*, unless a statute⁶ authorizes such a settlement.⁷

As we have seen, a threat to prosecute will not in all

¹ *Dunkin v. Hodge*, 46 Ala. 523.

² *Ormerod v. Dearman*, 100 Pa. St. 561; *Bailey v. Buck*, 11 Vt. 252; *Catlin v. Henton*, 9 Wis. 746; *Bobb v. Hitchcock*, 40 Ala. 468; 20 Am. Rep. 288; *McMahon v. Smith*, 47 Conn. 221; 36 Am. Rep. 67; *Hinesburgh v. Sumner*, 9 Vt. 28; 31 Am. Dec. 600; *Dixon v. Olmstead*, 9 Vt. 310; 31 Am. Dec. 639; *Woodruff v. Hinman*, 11 Vt. 592; 34 Am. Dec. 712; *Gulford Co. v. March*, 89 N. C. 268; *Peed v. McKee*, 42 Iowa, 689; 20 Am. Rep. 631; *Lindsay v. Smith*, 78 N. C. 328; 24 Am. Rep. 463; *Bell v. Wood*, 1 Bay, 249; *Mattocks v. Owens*, 5 Vt. 42; *Plumer v. Smith*, 5 N. H. 553; 22 Am. Dec. 478; *Corley v. Williams*, 1 Bail. 568; *Den v. Monroe*, 5 N. J. (L.) 470; *Town of Sharon v. Gager*, 46 Conn. 189; *Schultz v. Culbertson*, 46 Wis. 313; *Ricketts v. Harvey*, 106 Ind. 564; *Wolf v. Fietemeyer*, 88 Ill. 418.

³ *Cameron v. McFarland*, 2 Car. Law

Repos. 415; 6 Am. Dec. 566; *Plumer v. Smith*, 5 N. H. 553; 22 Am. Dec. 478; *Crowden v. Reece*, 80 Ind. 1; *Haltkaus v. Kruitiz*, 17 Ill. App. 434; *Pearce v. Wilson*, 111 Pa. St. 14; 56 Am. Rep. 243; *Bredin's Appeal*, 92 Pa. St. 241; 37 Am. Rep. 677.

⁴ *Williams v. Bailey*, L. R. 1 H. L. 230.

⁵ *Souhegan Bk. v. Wallace*, 61 N. H. 24; *Bothwell v. Brown*, 51 Ill. 234; *Schommer v. Farwell*, 56 Ill. 542.

⁶ The statutes of several of the States permit parties to compromise prosecutions for misdemeanors.

⁷ *McMahan v. Smith*, 47 Conn. 223; *Reed v. McKee*, 42 Iowa, 689; *Partridge v. Hood*, 120 Mass. 405; *Malli v. Willott*, 57 Iowa, 705; *Roll v. Baguet*, 4 Ohio St. 400; *Oxford National Bank v. Kirk*, 90 Pa. St. 49; *Atwood v. Fish*, 101 Mass. 368; *Wheaton v. Ansley*, 71 Ga. 35; *Schommer v. Farwell*, 56 Ill. 542.

cases avoid a promise by the criminal.¹ And the promise not to prosecute to be illegal must be made for the sake of gain and not from motives of kindness or charity,² or on account of relationship or kindred.³

§ 317. **Maintenance and Champerty.** — Maintenance at common law is an officious intermeddling in a suit, that in no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend. It is said to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression. In the United States there must be something vexatious in the maintenance; a purpose of stirring up strife and continuing unnecessary litigation.⁴

Champerty is a species of maintenance, being a "bargain with a plaintiff or defendant to divide the land or other thing sued for between them if he prevails at law."⁵ In many of the States, the common law of champerty exists, either by statute or by judicial decision,⁶ while in others the doctrine is rejected as being the product of an obsolete social system and inapplicable to the state of society of to-day.⁷ In others again it is held — and this is certainly the

¹ See *ante*, DURESS; *Swope v. Ins. Co.*, 98 Pa. St. 211; *Plant v. Gunn*, 2 Woods, 372; *Ford v. Cratty*, 52 Ill. 312.

² *Ward v. Allen*, 2 Met. 53; 35 Am. Dec. 387.

³ *Dodson v. Swan*, 2 W. Va. 511; 98 Am. Dec. 737.

⁴ *Thalhimer v. Brencherhoff*, 3 Com. 623; 15 Am. Dec. 303; *Perine v. Dunn*, 3 Johns. Ch. 506; *McCall v. Capehart*, 20 Ala. 521.

⁵ *Bouv. Law Dict.*

⁶ *Martin v. Clark*, 8 R. L. 389; 5 Am. Rep. 586; *Backus v. Byron*, 4 Mich. 535; *Thurston v. Percival*, 1 Pick. 415; *Small v. Mott*, 22 Wend. 403; *Sedgwick v. Stanton*, 14 N. Y. 289; *Boardman v. Thompson*, 25 Iowa, 487; *Rust v. Larue*, 4 Litt. 112; 14 Am. Dec. 172; *Brown v. Beauchamp*, 5 T. B. Mon. 81; 17 Am. Dec. 81; *Coleman v. Billings*, 39 Ill. 183;

Barnes v. Strong, 1 Jones (Eq.), 100; *Wheeler v. Pounds*, 24 Ala. 472; *Vansever v. Stickney*, 75 Ala. 225; *Weakly v. Hall*, 13 Ohio, 167; 42 Am. Dec. 194; *Gilbert v. Holmes*, 64 Ill. 548; *Barker v. Barker*, 14 Wis. 131; *Miller v. Larson*, 19 Wis. 463; *Stearns v. Felker*, 28 Wis. 594; *Ogden v. Des Arts*, 4 Duer, 275; *Hovey v. Houson*, 51 Me. 62; *Martin v. Amos*, 13 Ired. 198; *Quigley v. Thompson*, 63 Ind. 317; *Staatenburg v. Marks*, 79 Ind. 183; *Holloway v. Lowe*, 7 Port, 483; *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 323; *Lytle v. State*, 17 Ark. 608; *Webb v. Armstrong*, 5 Humph. 379; *Slade v. Rhodes*, 2 Dev. & B. 24; *Moses v. Bagley*, 55 Ga. 233; *Davis v. Sharron*, 15 B. Mon. 64; *Christie v. Sawyer*, 44 N. H. 298; *Lathrop v. Amherst Bk.*, 9 Met. 489.

⁷ *Danforth v. Streeter*, 23 Vt. 490; *Sherley v. Riggs*, 11 Humph. 53; *Bentlinek*

better view — that it is an essential element of champerty that the person shall contribute to the expense of a litigation; and that therefore an agreement with an attorney that he is to receive as compensation for his services a portion of the subject-matter of the litigation is not champertous, unless he also agrees to pay or advance the costs and expenses of the suit.¹

It is no defense to a suit that the plaintiff has made a champertous contract for its prosecution;² and though the contract with an attorney is void for champerty he is allowed to recover the reasonable value of his service in prosecuting the suit³—a strange and seemingly absurd exception to the settled rule that one can take no benefit under an illegal contract.

§ 318. **Agreements to Refer to Arbitration.** — An agreement that matters which have arisen or may arise between the parties shall be referred to an arbitrator or arbitrators is not binding and either party may have recourse to the courts notwithstanding it.⁴ The reason of the rule is by

v. Franklin, 38 Tex. 458; *Cain v. Munroe*, 23 Ga. 82; *Mathewson v. Fitch*, 22 Cal. 86; *Ballard v. Carr*, 48 Cal. 74; *Richardson v. Rowland*, 40 Conn. 565; *Schaferman v. O'Brien*, 28 Md. 565; 92 Am. Dec. 708; *Hickox v. Elliot*, 23 Fed. Rep. 18; *Phillip v. South Park Commrs.*, 119 Ill. 629.

¹ *Duke v. Harper*, 66 Mo. 51; 27 Am. Rep. 314; 2 Mo. App. 1; *Crow v. Harmon*, 26 Mo. 417; *Allard v. Lamirand*, 29 Wis. 502; *Arden v. Patterson*, 5 Johns. Ch. 44; *Moses v. Bagley*, 54 Ga. 268; *Martin v. Clark*, 8 E. L. 389; 5 Am. Rep. 586; *Bayard v. McLane*, 3 Harr. (Del.) 189; *Thompson v. Reynolds*, 73 Ill. 11; *Stearns v. Felker*, 28 Wis. 504; *Moody v. Harper*, 38 Miss. 590; *Meeks v. Dewberry*, 57 Ga. 263; *Boardman v. Thompson*, 25 Iowa, 487; *Martin v. Amos*, 3 Ired. 301; *Coleman v. Billings*, 89 Ill. 183; *Taylor v. Hinton*, 66 Ga. 743; *Million v. Ohnsorg*, 10 Mo. App. 432; *Atchison, etc., R. R. Co. v. Johnson*, 29 Kan. 218;

Blaisdell v. Ahern, 144 Mass. 383; 59 Am. Rep. 99; *Stanton v. Embrey*, 93 U. S. 548; *Wright v. Tebbitts*, 91 U. S. 252; *Wylie v. Cox*, 15 How. 415; *Trist v. Child*, 21 Wall. 450; 1 McAr. 1.

² *Barnes v. Scott*, 117 U. S. 582; *Cartwright v. Burnett*, 3 McOrary, 60; *Bent v. Priest*, 10 Mo. App. 543; 86 Mo. 475; *Small v. R. R. Co.*, 55 Ia. 582; *Whitney v. Kirtland*, 27 N. J. (Eq.) 333; *Robinson v. Beall*, 26 Ga. 17.

³ *Rust v. Larne*, 4 Litt. 412; 14 Am. Dec. 172; *Merritt v. Lampert*, 10 Paige, 352; 2 Denio, 667; *Stearns v. Felker*, 28 Wis. 504; *Coldwell v. Shepherd*, 6 T. E. Mon. 389.

⁴ *Wood v. Humphrey*, 114 Mass. 185; *Lafin v. R. R. Co.*, 34 Fed. Rep. 859; *Gray v. Wilson*, 4 Watts, 39; *Hill v. Moore*, 40 Me. 515; *Cavanagh v. Dooley*, 6 Allen, 66; *Rowe v. Williams*, 97 Mass. 163; *Hurst v. Litchfield*, 39 N. Y. 377; *Smith v. H. Co.*, 36 N. H. 487; *March v. R. Co.*, 40 N. H. 548; 77 Am. Dec. 732; *Stone*

some traced to the jealousy of the courts and a desire to repress any attempt to encroach on the exclusiveness of their jurisdiction, and by others to an aversion on the part of the courts from reason of public policy to sanction contracts by which the protection which the law affords the citizen is renounced.¹

But when a contract contains a condition which provides that disputes arising out of it shall be referred to arbitration, the validity of such a condition depends upon rather a fine distinction. Where the *amount of damage sustained by a breach* of the contract is to be ascertained by specified arbitration before any right of action arises, the condition is good;² but where all matters in dispute, of whatever sort, are to be referred to arbitrators and to them alone, the condition is illegal.³ The one imposes a *condition precedent* to a right of action accruing, the other endeavors to *prevent* any right of action accruing at all. As well put by an English judge: ⁴ "If a tenant covenant that he will cultivate the demised land in a husband-like manner and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them."

The principle is frequently applied in the United States to contracts for the construction of buildings, railroads,

v. Dennis, 3 Port. 231; *Lauman v. Young*, 31 Pa. St. 306; *Snodgrass v. Gavitt*, 23 Pa. St. 221; *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; 14 Am. Dec. 289; *Pearl v. Harris*, 121 Mass. 390; *Trott v. City Ins. Co.*, 1 Cliff. 443; *Robinson v. Georges Ins. Co.*, 17 Me. 181; 35 Am. Dec. 239; *Liverpool, etc., Ins. Co. v. Creighton*, 51 Ga. 95; *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 360; *Hart v. Lauman*, 29 Barb. 419; *Sinclair v. Tallmadge*, 35 Barb. 607; *Binuse v. Page*, 1 Abb. App. 154; *Doyle v. Halpin*, 1 Jones & S. 389; *Holmes v. Rickett*, 56 Cal. 307; 38 Am. Rep. 54.

¹ *Delaware Canal Coal Co. v. Penn. Coal Co.*, 50 N. Y. 258.

² *Smith v. Briggs*, 3 Denio, 73; *Holmes v. Rickett*, 56 Cal. 307; 38 Am. Rep. 54; *Hood v. Hartshorn*, 100 Mass. 119; 1 Am. Rep. 89; *Rowe v. Williams*, 97 Mass. 163; *Smith v. R. Co.*, 36 N. H. 458; *Hurst v. Litchfield*, 39 N. Y. 377; *U. S. v. Robeson*, 9 Pet. 237; *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 258; *Berry v. Carter*, 19 Kan. 125.

³ Cases cited in first note to this section.

⁴ *Tredwen v. Holman*, 10 Week. Rep. 652; 1 H. & C. 73.

canals and other works involving numerous details. These contracts give rise to many questions which a court of law might reasonably send to a referee, and the parties may agree that such questions shall be determined by an architect or engineer or by arbitrators, and that such determination, or a *bona fide* effort to obtain it, shall be a *condition precedent* to the right to bring an action on the contract.¹ Contracts of insurance usually contain similar clauses. Thus an insurance policy provided that in case of differences arising touching any loss or damage, the matter might at the request of either party be submitted to impartial arbitrators whose award in writing should be binding on the parties to the amount of such loss or damage, "but shall not decide the liability of the company under this policy;" also, "it is furthermore mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until an award shall have been obtained fixing the amount of such claim in the manner hereinabove provided." It was held that no suit could be sustained against the objection of the company until an award had been made, although neither party previous to the suit had requested arbitration.²

But it must be expressly stipulated in all cases that the award or determination is a *condition precedent* to the right of action on the contract, or the agreement to arbitrate will be of no effect.³

¹ Delaware Canal Co. v. Penn. Coal Co., 50 N. Y. 250; Holmes v. Richet, 56 Cal. 307; Smith v. Boston & M. R. R., 36 N. H. 458; Berry v. Carter, 19 Kan. 125; Hudson v. McCartney, 33 Wis. 345; Reed v. Washington Ins. Co., 138 Mass. 572; Denver & New Orleans Const. Co. v. Stout, 8 Col. 61; Phoenix Ins. Co. v. Badger, 53 Wis. 288; Mentz v. Armenia Fire Ins. Co., 79 Pa. St. 480; Hurst v. Litchfield, 39 N. Y. 377.

² Yeomans v. Guard Fire, etc., Ins.

Co., 5 Ins. Law J. 858; Scott v. Avery, 5 H. L. Cas. 811; Braunstein v. Accidental Death Ins. Co., 1 Best & S. 722; 31 L. J. Q. B. 17.

³ Mentz v. Armenia Fire Ins. Co., 79 Pa. St. 480; Phoenix Ins. Co. v. Badger, 53 Wis. 288; Reed v. Washington Ins. Co., 138 Mass. 572; Allegre v. Ins. Co., 6 H. & J. 408; 14 Am. Dec. 289; Wynkoop v. Ins. Co., 91 N. Y. 473; 43 Am. Rep. 686; Robinson v. Ins. Co., 17 Me. 131; 35 Am. Dec. 239.

Agreements of a similar nature have been held illegal, as aiming to oust the jurisdiction of the courts; as, for example, a provision in the by-laws of a benefit association that the decision of the officers on the claim of a member shall be final and conclusive.¹ And parties are not allowed by contract to vary the procedure in the courts prescribed by statute. In Illinois a lease contained a provision that the landlord should have the right to take immediate judgment against the tenant in case of a default on his part without giving the notice and demand for possession and filing the complaint required by the statute. It was held that such a provision was illegal.²

§ 319. **Agreements Against Good Morals.**—The only aspect of immorality with which courts of law have dealt on the ground of public policy is sexual immorality, for the reason, it is submitted, that other forms of immorality are in breach of definite rules of the common law. Thus a libel may be a criminal offense, so is the publication of immoral literature, but neither seduction nor living in adultery, nor fornication was taken notice of by the criminal side of the common law courts.³ But under this head agreements like the following have been held void: a contract to board a bastard child and its mother, the father to be allowed to continue the illicit intercourse;⁴ a contract to furnish goods to a prostitute to assist her in her trade;⁵ a promise to pay money or make a gift to or marry a woman, in consideration of her allowing the promisor to have sexual intercourse with her.⁶

¹ *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196.

² *French v. Miller*, 126 Ill. 611; 9 Am. St. Rep. 651.

³ Nor was private drunkenness an offense at common law. Therefore it is said (*Pollock Contr.* 261): "Probably drunkenness would be on the same footing. It is conceived, for example, that a sale of intoxicating liquor to a

man who then and there avowed his intention of making himself or others drunk, with it, would be void at common law."

⁴ *Trovinger v. McBurney*, 5 Cow. 253.

⁵ *Pearce v. Brooks*, L. R. 1 Ex. 212.

⁶ *Hanks v. Naglee*, 54 Cal. 51; 35 Am. Rep. 67; *Steinfeld v. Levy*, 16 Abb. Fr. (N. S.) 26; *Baldy v. Stratton*, 11 Pa. St. 316;

A promise made in consideration of past illicit cohabitation was not regarded by the English courts as made on an illegal consideration, but as a mere gratuitous promise, binding if made under seal but void if made by parol.¹ This distinction which is founded on correct legal principles has been followed in some of our courts,² while in others where a sentimental feeling for the victim has obscured the vision of the judges, it has been held that a parol promise to pay money in consideration of, and after seduction, and as a compensation for the injury sustained by it, is founded upon a valid consideration.³

§ 320. *Contracts in Restraint of Marriage.* — Agreements in so far as they restrain the freedom of marriage are discouraged on political grounds, as injurious to the increase of the population and the moral welfare of the citizen.⁴ A promise not to marry at all is void; and so is a promise to marry no one but the promisee on penalty of paying her a certain sum of money, as there is no promise of marriage on either side, and the agreement is purely restrictive.⁵ So, too, a wager in which one man bet another that he would not marry within a certain time was held to be void; and so was what was called a "marriage benefit certificate" which was an agreement to pay a sum of money to another on condition that the payee

Goodall v. Thurman, 1 Head, 209; Forsythe v. State, 6 Ohio, 19; Walker v. Gregory, 38 Ala. 180; Wallace v. Rappleye, 103 Ill. 229; Wilson v. Ensworth, 85 Ind. 399; Boigneres v. Boulon, 54 Cal. 146. See Kurtz v. Frank, 76 Ind. 594; 40 Am. Rep. 275.

¹ Beaumont v. Reeve, 8 Q. B. 483.

² Brown v. Kinsey, 81 N. C. 245; Bunn v. Winthrop, 1 Johns. Ch. 329; Wyant v. Leuber, 23 Pa. St. 338; Singleton v. Bremer, Harp. 201. See Smith v. Du Bose, 78 Ga. 416; 6 Am. St. Rep. 280. Wallace v. Rappleye, 103 Ill. 249; McDonald v. Fleming, 12 B. Mon. (Ky. 285. A promise by a man who had carried

on illicit relations with a married woman who threatened him with prosecution that he would make a will in her and her child's favor was held void in Drennan v. Douglass, 103 Ill. 341; 40 Am. Rep. 595.

³ Smith v. Richards, 29 Conn. 232; Hotchkiss v. Hodge, 38 Barb. 117; Shenk v. Mingle, 13 S. & R. 28.

⁴ Conrad v. Williams, 6 Hill, 444; Mandelbaum v. McDonald, 29 Mich. 78; Chalfant v. Payton, 91 Ind. 202; 46 Am. Rep. 596; Sterling v. Sinnickson, 5 N. J. (L.), 756; Maddox v. Maddox, 11 Gratt. 804.

⁵ Lowe v. Peers, 4 Burr. 2225; Conrad v. Williams, 6 Hill, 444.

did not marry within a certain time, and if he did then a certain sum per day during the time he remained unmarried, as giving to one of the parties a pecuniary interest in the other's celibacy.¹

Conditions restraining marriage in gifts and wills are void if the restraint is unreasonable, but valid if the restraint is not absolute, but reasonable in respect to time, place, or person.² As for example: A condition not to marry under the age of twenty-eight;³ or without the consent of parent or guardian;⁴ or not to marry a particular person;⁵ or an absolute restriction upon the second marriage of a man or woman⁶ have all been held valid.

§ 321. **Marriage Brokage Contracts.** — What are called marriage brokage contracts, or promises made upon the consideration of procuring or bringing about a marriage are illegal.⁷ The civil law allowed matchmakers to receive compensation for their services, its policy appearing to be that all aid rendered in encouraging and establishing marriages was for the good of the nation and productive of public morality, inasmuch as it discouraged fornication, adultery and concubinage; but the common law looks at the thing in a different light. The latter considers that the effect of such agencies is to encourage influences of a per-

¹ *Hartley v. Rice*, 10 East, 22; *Chalfant v. Payton*, *supra*. For another case of a marriage insurance contract, see *White v. Equitable Benefit Union*, 76 Ala. 251; 53 Am. Rep. 325. A contract to pay a certain sum of money to A on his marriage with B, on condition that A shall give the promisor "the exclusive right to carry the marriage benefit insurance" on A and B, is void. *James v. Jellison*, 94 Ind. 293; 48 Am. Rep. 151.

² *Pomeroy's Eq. Jur.*, § 933; *Scott v. Tyler*, 2 Dick. 712.

³ *Young v. Fruze*, 8 De Gex, M. & G. 756.

⁴ *Clarke v. Parker*, 19 Ves. 1; *Scott*

v. Tyler, 2 Brown Ch. 431; *Collier v. Slaughter*, 20 Ala. 263.

⁵ *Scott v. Tyler*, 2 Brown Ch. 431.

⁶ *Newton v. Marsden*, 2 Johns. & H. 356; *Allen v. Jackson*, L. R. 1 Ch. Div. 399; *Phillips v. Medberry*, 7 Conn. 568; *Collier v. Slaughter*, 20 Ala. 263; *Holmes v. Field*, 12 Ill. 424; *Bennett v. Robinson*, 10 Watts, 348. A contract by which a husband agrees to pay his divorced wife \$45 a month for her support "for so long a time as she does not marry again" is not illegal. *Jones v. Jones*, 27 Pac. Rep. 85.

⁷ *Crawford v. Russell*, 63 Barb. 92; *Weeks v. Hill*, 38 N. H. 204; *Johnson v. Hunt*, 81 Ky. 321; *Drury v. Hooke*, 1 Vern. 412.

nicious nature by promoting many unhappy marriages, causing the loss of the influence of parents over their children, and holding out false and seductive hopes, by the self-interest of brokerage agents.

§ 322. **Agreements to Facilitate Divorce.** — Agreements between husband or wife to facilitate a divorce between them though prohibited by statute in some of the States¹ are, independent of statute, illegal on grounds of public policy. Therefore, any contract which binds one party to pay money or transfer property in consideration that the other agrees to withdraw his or her opposition to divorce proceedings is void as against the policy of the law.² And so is a promise by a married man to marry a woman when he has obtained a divorce from his wife.³

§ 323. **Agreements for Separation.** — Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation. But if such agreements provide for a possible separation in the future they are void.⁴ The distinction rests on the ground that an agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact

¹ See *Lawson Rights, Rem., & Pr.*, § 792.

² *Hamilton v. Hamilton*, 89 Ill. 349; *Comstock v. Adams*, 23 Kan. 513; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Viser v. Bertrand*, 14 Ark. 266; *Muckenbush v. Holler*, 29 Ind. 139; 92 Am. Dec. 345.

³ *Noice v. Brown*, 88 N. J. (L.) 228; 20 Am. Rep. 388; 39 N. J. (L.) 133; 23 Am. Rep. 213.

⁴ *Randall v. Randall*, 37 Mich. 571; *Phillips v. Thorp*, 10 Oreg. 496; *Fox v. Davis*, 113 Mass. 265; 18 Am. Rep. 476; *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 404; *Rolette v. Rolette*, 1 Pinn. 370; 40 Am. Dec. 782; *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172; *Beach v. Beach*, 3 Hill, 260; 38 Am. Dec. 684; *Deming v. Williams*, 26 Conn., 226; 68 Am.

Dec. 336; *Hitner's Appeal*, 54 Pa. St. 110; *Loud v. Loud*, 4 Bush. 423; *Dutton v. Dutton*, 30 Ind. 432; *McKee v. Reynolds*, 26 Ia. 578; *Chapman v. Gray*, 8 Ga. 341; *Goodrich v. Bryant*, 4 Sneed, 325; *Bettie v. Wilson*, 14 Ohio, 257; *McCubbin v. Petterson*, 16 Md. 179; *Griffin v. Banks*, 37 N. Y. 621; *Walker v. Stringfellow*, 30 Tex. 570; *Gaines v. Poor*, 3 Met. 503; 79 Am. Dec. 559. Though it is held in a few cases that even in the case of an immediate separation if they are made directly between husband and wife without the intervention of a trustee, they are invalid. *Rogers v. Rogers*, 4 Paige, 516; 27 Am. Dec. 85; *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358; *Simpson v. Simpson*, 5 Dana, 140; *Carter v. Carter*, 14 S. & M. 59.

become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate,"¹ for in other words to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves.

§ 324. **Contracts in Restraint of Trade.** — Contracts in restraint of trade, regarded as absolutely void even when for a limited time or within a limited space, by the early common law,² are at the present day illegal and unenforceable only when the restraint is unreasonable. The reasons of public policy on which the rule is founded are these: 1. Such contracts diminish the means of parties making them of procuring their livelihood and that of their families. 2. They tempt improvident persons for the sake of present gain to deprive themselves of the power to labor in the future. 3. They deprive the public of the services of men in the employments in which they may be most useful to the country as well as themselves. 4. They discourage industry and enterprise and diminish the products of ingenuity and skill. 5. They prevent competition, enhance prices and expose the public to the evils of monopoly.³

Until within the last twenty years the courts followed certain rules in considering what was and what was not an unreasonable restraint, and the cases up to that time will

¹ 3 K. & J. 382.

² See *Wright v. Ryder*, 38 Cal. 357; 95 Am. Dec. 188. In the earliest case, *The Dyer's Case*, the action was on a bond conditioned that the defendant should not use his trade as a dyer for half a year. Such a contract would be clearly good at this day, but Hull, J., when he read the bond over flew into a passion, using some very strong language in some very strange French, to the effect that: "vous purres avec demurre sur ley que

l'obligation est voides ce que le condition est encounter common ley et per Dieu se le plaintiff fult icy il irra al prison tanque il ust fait fine au Roy." A recent author (*Pollock on Contr.* 314) does not think it conclusive that the judge lost his temper as is generally assumed, and certainly the *Mon Dieu* of our day has not the meaning of its English translation.

³ *Alger v. Thacher*, 19 Pick. 51; 81 Am. Dec. 119.

be found to fall under three heads, viz.: 1. Where the restraint was unlimited as to both time and space. 2. Where the restraint was limited as to space but unlimited as to time. 3. Where the restraint was limited as to time, but unlimited as to space. In the first case the restraint was void—a man could not agree that he would never in any part of the country carry on his trade. In the second case, the restraint was valid, while in the third case it was void, for while a man might promise that he would never carry on a certain trade or business within the city of New York or a certain distance of it, he could not promise that he would not carry it on anywhere for five years. The change which the later adjudicators have made in this classification will be shown in the following sections.

§ 325. **Restraint Unlimited as to Both Time and Space.**—Agreements unlimited as to both time and space, and in total and general restraint of trade are clearly void;¹ as for example an agreement that one will never carry on or be concerned in the business of an iron founder;² or that he will never be interested in any part of the United States in the business of manufacturing daguerrotype materials;³ or that he will never engage in the manufacture of matches in the city of St. Louis or at any other place.⁴

§ 326. **Restraint Limited as to Space but Unlimited as to Time.**—A contract limited as to space is not illegal because it is unlimited in point of time and may therefore continue during the whole life of the party restrained;⁵ as

¹ *Alger v. Thacher*, 19 Pick. 51; 31 Am. Dec. 119; *Keeler v. Taylor*, 53 Pa. St. 468; 31 Am. Dec. 221; *Chappell v. Brockway*, 21 Wend. 157; *Lange v. Werk*, 2 Ohio St. 519; *Moore v. Bonnett*, 40 Cal. 251; *Lawrence v. Kidder*, 10 Barb. 641; *Wright v. Ryder*, 38 Cal. 342; 95 Am. Dec. 187; *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *Berlin Works v. Parry*, 71 Wis. 495; 5 Am. St. Rep. 236.

² *Alger v. Thacher*, 19 Pick. 51; 31 Am. Dec. 119.

³ *Dean v. Emerson*, 102 Mass. 480.

⁴ *Peltz v. Echols*, 63 Mo. 171.

⁵ *Angier v. Webber*, 14 Allen, 211; 92 Am. Dec. 748; *Pike v. Thomas*, 4 Bibb. 486; 7 Am. Dec. 741; *Bowser v. Bliss*, 7 Blackf. 344; 43 Am. Dec. 93; *Cook v. Johnson*, 47 Conn. 178; 36 Am. Rep. 64; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec.

the agreement of a miller not to carry on the same business within thirty miles of Marion, Indiana;¹ or of a butcher not to engage in the same business within five miles of the business sold;² or of a physician not to practice in a certain town within a certain distance of the residence of the covenantee;³ or of a milliner not to carry on the same business in the future at a place which will interfere with the business sold;⁴ or of a lawyer not to practice in a certain town;⁵ or not to trade as a shoe-dealer in Addison, New York;⁶ or deal in fancy-goods in Cincinnati, Ohio;⁷ or in agricultural implements in Richmond, Indiana;⁸ or in cabinet-ware in Buffalo, New York;⁹ or in hardware in Hillsboro, Illinois;¹⁰ or in the grocery business within certain limits in Boston, Massachusetts.¹¹

§ 327. **Restraint Limited as to Time but Unlimited as to Space.**—But if the agreement though limited as to time has no limitation as to territory it is void;¹² as the contract of a person that he will not carry on the trade of a coal

348; *Worthy v. Jones*, 11 Gray, 168; 71 Am. Dec. 686; *Arnold v. Kreutzer*, 67 Ia. 214; *Gill v. Ferris*, 82 Mo. 156; *Bowers v. Whittle*, 63 N. H. 147; *Harrison v. Lockhart*, 25 Ind. 112; *Nobles v. Bates*, 7 Cow. 307; *Dwight v. Hamilton*, 113 Mass. 175; *Haldeman v. Simonton*, 55 Ia. 144; *Jenkins v. Temples*, 39 Ga. 655; 99 Am. Dec. 483; *Hubbard v. Miller*, 27 Mich. 15; 15 Am. Rep. 153; *Grundy v. Edwards*, 7 J. J. Marsh. 368; 23 Am. Dec. 437; *Webster v. Buss*, 61 N. H. 40; 60 Am. Rep. 317.

¹ *Bowser v. Bliss*, 7 Blackf. 344; 43 Am. Dec. 93.

² *Elves v. Crofts*, 10 C. B. 241.

³ *Butler v. Burleson*, 18 Vt. 176; *Linn v. Sigbee*, 67 Ill. 75; *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; *Miller v. Elliott*, 1 Ind. 484; 50 Am. Dec. 475; *McClurg's Appeal*, 58 Pa. St. 51; *Doty v. Martin*, 32 Mich. 412; *Timmerman v. Dever*, 52 Mich. 34; 50 Am. Rep. 240.

⁴ *Morgan v. Perhamus*, 36 Ohio St. 517; 38 Am. Rep. 607.

⁵ *Smalley v. Greene*, 52 Ia. 241; 35 Am. Rep. 267.

⁶ *Curtiss v. Gokey*, 68 N. Y. 300.

⁷ *Thomas v. Miles' Admr.*, 8 Ohio St. 274.

⁸ *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380.

⁹ *Weller v. Hersee*, 10 Hun, 431.

¹⁰ *Stewart v. Challacombe*, 11 Ill. App. 379.

¹¹ *Pierce v. Woodward*, 6 Pick. 206. In measuring the distance, the rule is to measure in a straight line as upon a map, and not according to the usual or practicable route. *Moufet v. Cole*, L. R. 8 Ex. 32; *Duignan v. Walker*, 28 L. J. Ch. 887; *Cook v. Johnson*, 47 Conn. 175.

¹² *Wiley v. Baumgardner*, 97 Ind. 66; 49 Am. Rep. 427; *Thomas v. Miles*, 3 Ohio St. 274; *Curtiss v. Gokey*, 68 N. Y. 300; *Dean v. Emerson*, 102 Mass. 490; *Albright v. Teas*, 37 N. J. (Eq.) 171; *Lange v. Werk*, 3 Ohio St. 520; *Callahan v. Dooley*, 45 Cal. 153; *Taylor v. Blanchard*, 18 Allen, 370.

merchant for twenty years;¹ or of an innkeeper for ten years;² or of the manufacturing of dies for thirty years;³ or that he will not engage in the dry-goods business for five years, with no limitation as to place.⁴

In the earlier American cases it was the accepted doctrine in this country that a contract wherein one of the parties promised not to carry on a specified business at any place within the State was void.⁵ But in *Oregon Steam Navigation Company v. Winsor*,⁶ a contract restraining one of the parties from running a steamboat on any of the waters of the State of California was held valid, Mr. Justice Bradley saying that as this country though composed of a number of States is one country in all matters of trade and business, in many cases it would be taking a narrow view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State. Subsequently in Michigan a contract not to carry on a publishing business in that State was sustained.⁷

§ 328. **The Modern Doctrine — Reasonableness of the Restraint the Test.**— The two cases last cited in the preceding section express the modern doctrine on the subject, viz., that no definite rule as to the extent of the restriction permissible can be laid down, but that the validity of an agreement in restraint of trade depends upon whether the restraint is such as to afford a fair protection to the interests of the party in favor of whom it is imposed; and that whatever restraint is larger than the necessary protection of the party is oppressive on the other party, without any countervailing benefit, and being injurious to the interests of the

¹ *Ward v. Byrne*, 5 Mees. & W. 548.

² *Mossop v. Mason*, 18 Grant (U. S.), 453.

³ *Saratoga Bank v. King*, 44 N. Y. 87.

⁴ *Wiley v. Baumgardner*, 97 Ind. 66; 40 Am. Rep. 437.

⁵ *Wright v. Ryder*, 36 Cal. 357; *Taylor*

v. Blanchard, 13 Allen, 370; *Lawrence v. Kidder*, 10 Barb. 641; *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241; *More v. Bonnet*, 40 Cal. 251; *Thomas v. Miles*, 3 Ohio St. 274.

⁶ 20 Wall. 67.

⁷ *Beal v. Chase*, 31 Mich. 490.

public, is void on the grounds of public policy.¹ Therefore a professional man or any other person engaged in legitimate business,² on selling his good-will may bind himself not to resume practice or business within what is under the circumstances reasonable, under all the circumstances of the case, for the protection of the purchaser.³

§ 329. **Other Cases of Lawful Restraint.** — The doctrine of the last sections does not apply to the sale of a patent right, as this is a monopoly authorized by the government itself for the encouragement of invention,⁴ and therefore a covenant by the vendor on the sale of a patent that he will at no time “aid, assist, or encourage in any manner any competition,” against the patent,⁵ or that he will not engage in business in opposition to the vendee,⁶ is valid. So on the sale of a secret process of manufacture of an article, which it is agreed shall be communicated for the exclusive benefit of the buyer, it becomes a reasonable and necessary stipulation that the seller shall not communicate the secret to any one, or carry on the manufacture in the future.⁷

Where a contract is made for the employment of a person in a certain trade or business, it may be accompanied with

¹ *Roussillon v. Roussillon*, 14 Ch. Div. 351; *Diamond Metal Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 465; *Talcott v. Brackett*, 5 Brad. (Ill.) 60; *Hubbard v. Miller*, 27 Mich. 15; 15 Am. Rep. 158; *Chappel v. Brockway*, 21 Wend. 162; per *Bronson, J.*; *Craft v. McConoughy*, 79 Ill. 350; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816.

² Where a person agreed not to carry on the liquor business the contract was held valid on the ground that this business was not a trade to be encouraged. *Harrison v. Lockhart*, 25 Ind. 112.

³ *McKinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. (S. C.) 442; *Wallis v. Day*, 2 M. & W. 273; *Alcock v. Giberton*, 5 Duer. 76; *McClurg's Appeal*, 58 Pa. St. 51; *Hubbard v. Miller*, 27 Mich. 15; *Dwight*

v. Hamilton, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Linn v. Sigbee*, 67 Ill. 75.

⁴ *Stearns v. Barrett*, 1 Pick. 443; 11 Am. Dec. 223; *Brewer v. Lamar*, 59 Ga. 756; 47 Am. Rep. 776; *Billings v. Ames*, 32 Mo. 285.

⁵ *Morse, etc., Mac. Co. v. Morse*, 103 Mass. 78.

⁶ *McKinnon Pen Co. v. Fountain Ink Co.*, 42 N. Y. (S. C.) 442.

⁷ *Leather Cloth Co. v. Lonsont*, L. R. 9 (Eq.) 345; *Bryson v. Whitehead*, 1 Sim. & St. 74; *Jarvis v. Peck*, 10 Paige, 118; *Vickery v. Welch*, 19 Pick. 523; *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 694; *Alcock v. Giberton*, 5 Duer. 76; *Brewer v. Lamar*, 69 Ga. 656; 47 Am. Rep. 766.

an absolute and unlimited restraint against his carrying on the same trade or business for another person, or in any other way, during the employment or for a reasonable time after the term of service has elapsed;¹ as where A agrees to write plays for B's theater and for no other,² or to write for C's magazine and for no other.³ Where the employment is for life, the restraint may be for life.⁴ And a partner may bind himself absolutely not to compete with the firm during the partnership.⁵

And an agreement that one person will trade only with another is valid;⁶ as where a physician agreed, on selling his drug store, to send all his prescriptions to be filled by one druggist;⁷ where A contracted to furnish B with sewing-machines at a discount, and upon credit, provided that B would deal exclusively with him;⁸ where a dentist agreed to purchase artificial teeth of a manufacturer on condition that the latter would not sell such teeth to any person in the town where the dentist resided;⁹ where a hotel-keeper contracted to buy no ice for his hotel except of a certain ice company;¹⁰ where A leased part of a warehouse for a certain term to B for the storage of wheat, agreeing that during the term he would not purchase, store or handle any wheat in the town except under the direction of B.¹¹

§ 330. **Combinations Among Workmen.**—Every man has a right to work for whom he pleases and on what terms he pleases. He may refuse to deal with a particular man

¹ *Pitlington v. Scott*, 15 M. & W. 657; *Middleton v. Brown*, 47 L. J. Ch. 411; *Sternberg v. O'Brien*, 22 Atl. Rep. (N. J.) 348.

² *Morris v. Coleman*, 18 Ves. 438.

³ *Stiff v. Cassell*, 2 Jur. (N. S.) 348.

⁴ *Wallis v. Day*, 3 Mees. & W. 273; *Morris v. Coleman*, 18 Ves. 438; *Stiff v. Cassell*, 2 Jur. (N. S.) 348.

⁵ *Kinsman v. Parkhurst*, 18 How. 289; *Dolph v. Troy Laundry Co.*, 28 Fed. Rep. 553.

⁶ *Lightner v. Menzel*, 35 Cal. 452; *Van*

Marten v. Babcock, 23 Barb. 633; *Schwablin v. Holmes*, 49 Cal. 655; *Long v. Towle*, 42 Mo. 545; 97 Am. Dec. 385; *Palmer v. Stebbins*, 3 Pick. 188; 15 Am. Dec. 204; *Brown v. Rounsavell*, 78 Ill. 589; *Levy v. Brown*, 41 Wis. 172.

⁷ *Ward v. Hogan*, 11 Abb. N. C. 478.

⁸ *Brown v. Rounsavell*, 78 Ill. 589.

⁹ *Clark v. Crosby*, 37 Vt. 188.

¹⁰ *Twomey v. People's Ice Co.*, 66 Cal. 233.

¹¹ *Kellogg v. Larkin*, 8 Chand. 188.

or class of men. It is perfectly legal for any number of persons without any unlawful object in view to agree that they will not work for or deal with certain persons or under a fixed price or without certain conditions.¹ The test is the legality of the intent. Thus a combination of workmen for the purpose of obtaining reasonable prices for their labor is not illegal.² But of a different nature is a conspiracy to obtain money from an employer by inducing his workmen to leave him and deterring others from working for him; and any association, in short, designed to coerce workmen to become members or to dictate terms to employers on which their business shall be conducted, by means of threats of loss, interference with their property, traffic or lawful employment of other persons, is, *pro tanto*, an illegal combination.³

§ 331. **Combinations among Employers and Traders.**—Contracts between employers or traders whose effect is to restrain the freedom of trade or the free employment of labor are illegal and void.⁴ The following may be said to fall under this rule, viz.: An agreement between the members of an association of salt manufactures that no members should sell any salt during the life of the association except at retail at the factory and at prices fixed by a committee.⁵ a contract between a railroad company and a

¹ *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Boston Glass Co. v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 490. This subject lies more properly in the criminal law,—the law of conspiracy. For a learned discussion of the law as to conspiracies to control wages of workmen, see *People v. Fisher*, 14 Wend. 9; and note in 28 Am. Dec. 507; *Com. v. Hunt*, 4 Met. 111; 38 Am. Dec. 346.

² *Sayre v. Ben. Assn.* 1 Duv. 143; 85 Am. Dec. 613; and see *Brown v. Matheson*, 14 Allen, 503; *Snow v. Wheeler*, 113 Mass. 185.

³ *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48.

⁴ *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258; *Morris Run Coal Co. v. Barclay*, 68 Pa. St. 173; 8 Am. Rep. 159; *Hartford, etc., R. R. Co. v. New York, etc., R. R. Co.*, 3 Rob. (N. Y.) 416; *Clancy v. Onondaga, etc., Co.*, 63 Barb. 375; *Kurtz v. Citizens' Oil Co.*, 73 Pa. St. 392; *Arnott v. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190; *Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387; *Oregon Steam Nav. Co. v. Hale*, 1 Wash. 233; *Wiggins Ferry Co. v. R. R. Co.*, 5 Mo. (App.) 347. *Stewart v. R. R. Co.*, 38 N. J. (L.) 505.

⁵ *Cent Ohio Salt Co. v. Guthrie*, 25 Ohio St. 668.

telegraph company that the former will not allow any other telegraph company to construct a line along its road;¹ an agreement by members of a carrying association, the terms of which are that no one should carry freight for less than the rate fixed by the association, without regard to the question whether the rate was reasonable or not;² a contract entered into between two gas companies, that one of them shall discontinue for a hundred years the manufacture and sale of illuminating gas in a city in which it had been granted by the legislature the right to manufacture and sell such gas;³ an agreement between two large coal-mining companies that one would take all the coal the other should mine and the other should not sell to any third parties;⁴ a grant of the "exclusive" right of way and privilege to construct and maintain tubing for the transportation of oil through a tract of two thousand acres of land;⁵ an agreement by several commercial firms by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of the majority of them;⁶ an agreement between the grain-dealers of a town which purported to be a contract of partnership for the purpose of dealing in grain, but the real object of which was to form a secret combination to control the grain trade and suppress competition;⁷ a contract by which one railroad company agrees with another not to do business between certain points, and not to connect with, or take business from, or give business to, any

¹ *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; 88 Am. Rep. 781; *Western Union Tel. Co. v. R. R. Co.*, 3 McCrary, 130; *Western Union Tel. Co. v. Tel. Co.*, 23 Fed. Rep. 12; *Baltimore, etc., Tel. Co. v. Western Union Tel. Co.*, 24 Fed. Rep. 319. But see *Western Union Tel. Co. v. Tel. Co.*, 7 Biss. 387; *Western Union Tel. Co. v. R. R. Co.*, 86 Ill. 246; 29 Am. Rep. 28.

² *Sayre v. Benevolent Assn.*, 1 Duvall, 143; 85 Am. Dec. 613; *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 223; *Hooker v.*

Venderventer 4 Denio, 349; 47 Am. Dec. 258.

³ *Chicago Gas Light Co. v. Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124.

⁴ *Arnott v. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 180.

⁵ *West Virg. Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 800; 46 Am. Rep. 527.

⁶ *India Assn. v. Kock*, 14 La. Ann. 168.

⁷ *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171.

other railroad which may be afterwards constructed, and not accept freight and passengers from a certain other company, except at higher than the usual rates.¹

So contracts for the purpose of making what is called a "corner" in the market whereby to control the prices of articles of necessity in life, such as bread-stuffs, fuel, etc., are void as against public policy.²

§ 332. Carriers of Goods—Limiting Liability for Negligence. — A common carrier has two distinct liabilities, including first all losses occasioned by accident or mistake and without his fault, where he is liable by the custom of the realm, or the common law, as an insurer, and, second, for all losses occasioned by his default or negligence, where he is liable as an ordinary bailee. In this country it is held that he may limit his responsibility as an insurer, by special contract, but that he cannot by any contract exempt himself from responsibility for the consequences of his own negligence, or for the negligence of his servants or agents—contracts of the latter kind being considered as being void, because they are against public policy, and because they are supposed to be obtained under circumstances which give to the carrier an undue advantage in obtaining terms which the law cannot enforce without giving its sanction to injustice and oppression.³

§ 333. Contracts With Innkeepers. — The innkeeper, like the common carrier, is at common law an insurer of the property of his guests.⁴ This rule had its origin in con-

¹ Denver, etc., R. R. Co. v. R. R. Co., 15 Fed. Rep. 650.

² Raymond v. Leavitt, 46 Mich. 447; 41 Am. Rep. 170; Sampson v. Shaw, 101 Mass. 145; 3 Am. Rep. 327; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 174; Arnot v. Coal Co., 68 N. Y. 558; 23 Am. Rep. 170; Fisher v. Bush, 35 Hun, 645; Craft v. McConoughy, *supra*; Wright v. Crabbs, 78 Ind. 487. Though we have

seen that under some circumstances it is lawful for parties to associate to buy property at public sale. Smith v. Ullman, 58 Md. 183; 43 Am. Rep. 329. *Ante*, § 367.

³ R. R. Co. v. Lockwood, 17 Wall. 357. The decisions on this subject are too numerous to cite here. See Lawson's Contracts of Carriers, § 23, *et seq.*, where the cases are collected.

⁴ Cayle's Case, 8 Coke, 32; Berkshire

siderations of public policy. It was essential to the interests of the realm that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The safeguards, of which the law gave assurance to the wayfarer, were akin to those which invested each English home with the legal security of a castle. The traveler was peculiarly exposed to depredation and fraud; he was compelled to repose confidence in a host who was subject to constant temptation, and favored with peculiar opportunities if he chose to betray his trust.¹ But by statute in a number of the States, an innkeeper's extraordinary liability has been restricted, and he is permitted to relieve himself from the common-law liability for money or valuables lost or stolen, by posting a notice that he keeps a place for their deposit.²

And though the common law permitted him to restrict his liability by special contract with his guest, such a contract could neither be made nor will the statutory exceptions be so construed as to cover any loss arising from his negligence — such an exemption being contrary to public policy.³

Woolen Co. v. Proctor, 7 Cush. 423; *Richmond v. Smith*, 8 Barn. & C. 9; *Morgan v. Ravey*, 6 Hurl. & N. 277; *Day v. Bather*, 2 Hurl. & C. 14; *Shaw v. Berry*, 31 Me. 478; 53 Am. Dec. 628; *Norcross v. Norcross*, 53 Me. 163; *Shoecraft v. Bailey*, 25 Iowa, 553; *Manning v. Wells*, 9 Humph. 746; 51 Am. Dec. 688; *Washburn v. Jones*, 14 Barb. 196; *Weisenger v. Taylor*, 1 Bush. 275; 39 Am. Dec. 626; *Burrows v. Trieber*, 21 Md. 390; 83 Am. Dec. 590; *Sasseir v. Clark*, 37 Ga. 242; *Fuller v. Coats*, 18 Ohio St. 343; *Williams v. Earle*, 44 N. Y. 173; *McDonald v. Edgerton*, 5 Barb. 560; *Cheesborough v. Taylor*, 12 Abb. Pr. 227; *Mateer v. Brown*, 1 Cal. 221; 52 Am. Dec. 203; *Walsh v. Porterfield*, 87 Pa. St. 376; *Ramaley v. Leland*, 43 N. Y. 539; *Hallenbake v. Fish*, 8 Wend. 547; 24 Am. Dec. 88; *Neal v. Wilcox*, 4 Jones, 146; 67 Am. Dec. 266; *Pettigrew v. Barnum*, 11 Md. 434; 69 Am. Dec. 213; *Pinkerton v. Wood-*

ward, 33 Cal. 600; 91 Am. Dec. 637; *Thickston v. Howard*, 8 Blackf. 535; *Sibley v. Aldrich*, 33 N. H. 553; 66 Am. Dec. 745; *Hulett v. Swift*, 42 Barb. 249; 33 N. Y. 571; 88 Am. Dec. 406; *Piper v. Manny*, 21 Wend. 282; *Grinnell v. Cook*, 3 Hill, 435; 38 Am. Dec. 663; *Mason v. Thompson*, 9 Pick. 280; 30 Am. Dec. 471.

¹ *Hulett v. Swift*, 33 N. Y. 571; 88 Am. Dec. 663.

² Such statutes are in force in Alabama, California, Delaware, Dakota, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee and Wisconsin. In Missouri and Wisconsin, the innkeeper is not liable for a loss by fire not produced by him or any of his servants. See *Lawson Rights, Rem., & Pr.*, § 1788.

³ *Lawson Rights, Rem., & Pr.*, § 1797

§ 334. **Contracts with Telegraph Companies.**—For similar reasons of public policy to those which we have seen prevent a common carrier from escaping liability for negligent acts, a telegraph company is not permitted to avoid its liability for the consequences of the negligence of itself or its duly authorized agents.¹ Therefore, notwithstanding any agreement or condition in the contract between the sender and the company, the latter will still be liable for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary skill on the part of its operatives, or the use of defective instruments, though it will not be liable for mistakes occasioned by causes beyond its control, such as atmospheric changes, or the vagaries of electricity, provided these mistakes could not have been avoided by the exercise of ordinary care and skill on the part of the operating agents of the company.²

§ 335. **Carriers of Passengers—Limiting Liability for Negligence.**—A carrier of a passenger who has paid a consideration for his passage can not exempt himself from liability for damages caused by his own negligence or that of his servants, by any contract which he may have in-

¹ *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *True v. International Tel. Co.*, 60 Me. 19; 11 Am. Rep. 156; *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *Redpath v. Western Union Tel. Co.*, 119 Mass. 71; 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Ellis v. Am. Tel. Co.*, 13 Allen, 225; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 453; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 393; *Dorgan v. Telegraph Co.*, 1 Am. L. T. 406; *Sweetland v. Illinois etc., Tel. Co.*, 37 Iowa, 433; 1 Am. Rep. 285; *Bartlett v. Tel. Co.*, 62 Me. 209; 16 Am. Rep. 487; *Mandee v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; 41 Am. Rep. 500; *White v. Western*

Union Tel. Co., 14 Fed. Rep. 710; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 338; *Smith v. Western Union Tel. Co.*, 33 Ky. 104; 4 Am. St. Rep. 136; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 679; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795.

² *Sweetland v. Illinois, etc., Tel. Co.*, 37 Iowa, 433; 1 Am. Rep. 285; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; 9 Phila. 86; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 453; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 279; 60 Ill. 421; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 133.

duced his customer to approve. Such a contract is void as against the policy of the law,¹ even though the passenger is a gratuitous one, riding free and paying no fare.²

§ 336. Agreements Affecting Duties Towards Third Persons. — It has been suggested³ that agreements which tend to discourage moral duties towards third persons are void as against public policy, as for example a covenant by a land owner to let all his cultivated land lie waste, or a clause in a charter party prohibiting deviation even to save life. An illustration of agreements invalid because they tend towards the omission of a legal duty towards individuals is to be seen in those by which a father deprives himself of the right to the custody of his children.⁴ Therefore a contract by which a father surrenders custody of his child may be revoked by him at any time, and if the party to whom it has been transferred refuses to deliver it he may obtain possession by habeas corpus,⁵ unless in the opinion of the court, it would be greatly to the benefit of the child, on account of

¹ See Lawson's Contracts of Carriers, § 214, *et seq.*, where the numerous cases on this point are collected.

² *Railroad Co. v. Lockwood*, 17 Wall. 387; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 488; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; *Rose v. Des Moines Valley R. Co.*, 39 Ia. 246; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46; 68 Am. Rep. 388. In some States a different and to the author an unwise view of the question is taken. See Lawson's Contracts of Carriers, § 219, *et seq.*; *Kinney v. Cent. R. Co.*, 33 N. J. (L.) 407; 34 *Id.* 513; *Griswold v. New York, etc., R. Co.* 53 Conn. 371; 55 Am. Rep. 115; *Quimby v. Boston, etc., R. Co.*, 23 N. E. Rep. 305; and the New York cases from *Wells v. New York Cent. R. Co.*, 26 Barb. 641 (1858) 34 N. Y. 181 (1862) to *Stinson v. New York, etc., R. Co.*, 33 N. Y. 333 (1865), where Davis, J. says "The fruits of the rule are already being gathered in in-

creasing accidents through the decreasing care and vigilance on the part of those corporations, and they will continue to be reaped until a just sense of public policy shall lead to restrictive legislation upon the former to make this kind of contracts." But neither the courts nor the legislature has yet given heed to this warning. See *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75 (1885); *Ulrich v. New York, etc., R. Co.*, 108 N. Y. 80; 2 Am. St. Rep. 368 (1888).

³ Pollock Contr. 306, citing *Cockburn O. J.*, in 5 O. P. D. 306.

⁴ See Lawson Rights, Rem. & Fr., § 816; *Re Scarritt*, 76 Mo. 565; 43 Am. Rep. 768.

⁵ *Regina v. Smith*, 16 Eng. L. & Eq. 221; *Schouler on Dom. Rel.*, 251; *Torrington v. Norwick*, 21 Conn. 543; *People v. Mercien*, 3 Hill, 410; 38 Am. Dec. 644; *State v. Baldwin*, 5 N. J. (Eq.) 454; 45 Am. Dec. 399; *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177; *State v. Libbey*, 44 N. H. 321; 83 Am. Dec. 223.

the character, or means of support of the father, that it should remain in the custody of the person to whom he committed it.¹ The principle running through all the cases is that the custody of children cannot be made a mere matter of bargain, and that the parent "cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own."²

So a contract by a servant with his master to waive all damages for injuries resulting from the negligence of the latter is void as against public policy.³ For, as in the case of the carrier of passengers, the law will not permit an agreement whose tendency (by removing one of the restraints against negligence and want of care, viz.: the liability to pay damages in a court of law), is to render a person or corporation less careful of the safety of individuals or of the public. In a recent case in Iowa it was held that a contract by a railroad in settlement of a claim for personal injuries by an employe to give him permanent employment on a switch-engine is not void as against public policy in that it would require the company to employ the injured person, even though he was not competent, in violation of its obligation to the public; for such a contract does not require the company to keep him at work when incapable.⁴

(d) *Effect of Illegality upon Agreement.*

§ 337. **Introductory.** — We have reached now the last branch of the subject of Illegality in Contract, viz., its effect upon the validity of a contract. And although the principle is of course that an unlawful agreement cannot be

¹ *Verser v. Ford*, 37 Ark. 27; *Drumb v. Keen*, 47 Ia. 435; *State v. Barrett*, 45 N. H. 15; *Bently v. Terry*, 59 Ga. 555; 27 Am. Rep. 397.

² *Andrews v. Salt*, 8 Ch. 632.

³ *Cook v. R. R. Co.*, 72 Ga. 48; *Kansas*

Pacific R. R. Co. v. Peavey, 29 Kan. 169; 44 Am. Rep. 630; *Lake Shore, etc. R. R. Co., v. Spangler*, 44 Ohio St. 471.

⁴ *Jessup v. Chicago &c. Ry. Co.*, 48 N. W. Rep. 77.

enforced, yet it will be found when one comes to examine illegal agreements with a view to their enforcement in a court of law that this maxim is not universally true. The reason for this is that the effect of illegality upon the validity of contracts in which it appears must of necessity vary according to circumstances. For ;

(a) The illegality may affect the whole, or only a part of a contract, and the legal and illegal parts may or may not be capable of separation.

(b) The direct object of a contract may be the doing of an illegal act, or the direct object may be innocent though the contract is designed to further an illegal purpose.

(c) The parties may both be ignorant, or both be aware of the illegality which remotely or directly affects the transaction ; or one may be innocent of the objects intended by the other.

(d) The contract may be legal where it was made and illegal where it is to be performed, or *vice versa*, or it may be legal or illegal as the case may be in the jurisdiction where it is sought to be enforced.

(e) The law may have been changed between the time of its making and the time of performance or enforcement.

And (f) It should not be forgotten in this connection that an agreement in which no illegality appears, and of which neither the consideration nor the promise in itself imports any illegality, may, nevertheless, be made for an illegal purpose, and the agreement, though unobjectionable in its terms, may then be rendered void by the illegality of the purpose for which it is made. And for the proving of the real purpose oral evidence is always admissible, even though the contract be under seal.¹

§ 338. Consideration or Promise Wholly Illegal. — If the whole consideration or the whole promise is illegal the agreement is void; if it is executed the courts will not

¹ See *post*, § 375.

interfere, while if the contract is executory they will lend no aid to either party to enforce it.¹

§ 339. **Consideration Legal but Promise Partly Illegal.** — A lawful promise made for a lawful consideration is not invalid simply by reason of an unlawful promise being made at the same time for the same consideration,² for as said in an old case: ³ “That if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful, in this case the covenants or conditions which are against law are void *ab initio* and the others stand good.” Thus a contract in restraint of trade may be valid as to the limits which are reasonable though void as to others.⁴ Therefore where A agreed with B not to manufacture ochre in Lehigh county or elsewhere it was held that he might be enforced from manufacturing in Lehigh county;⁵ and where the contract was that the defendant would not engage in the manufacture of matches “in the city of St. Louis or at any other place,” it was held that the covenant though void as a general restraint was valid as restricted to St. Louis.⁶

In the early history of the common law the judges, fearing that statutes might be eluded, laid it down that a “statute is like a tyrant, where he comes he makes all void,

¹ See *ante*, § 54; *Implied Contracts*.

² *Presbery v. Fisher*, 18 Mo. 50; *Leavitt v. Palmer*, 3 N. Y. 19; *State v. Findley*, 10 Ohio, 51; *Ohio v. Board of Education*, 35 Ohio St. 519; *Penn. Co. v. Wentz*, 37 Ohio St. 333; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. (L.) 530; *Erie R. Co. v. Union, etc., Co.*, 35 N. J. (L.) 240; *United States v. Bradley*, 10 Pet. 360; *Gelpcke v. Dubuque*, 1 Wall. 222; *United States v. Hodson*, 10 Wall. 408; *United States v. Mora*, 97 U. S. 422; *Ware v. Curry*, 67 Ala. 782; *Thayer v. Rock*, 13 Wend. 53; *Loomis v. Newhall*, 15 Pick. 159; *Hanauer v. Gray*, 25 Ark. 350; 99 Am. Dec. 228. A distinction has been made in a few cases between what is *malum prohibitum* and *malum in se*, under which it is held that any stipulation

to perform an immoral act will render the contract void *in toto*. *Bierbauer v. Wirth*, 10 Bias. 69.

³ *Pigots' Case*, Coke Rep. 26.

⁴ *Hubbard v. Miller*, 27 Mich. 15; 15 Am. Rep. 153; *Dean v. Emerson*, 103 Mass. 480.

⁵ *Smith's Appeal*, 113 Pa. St. 579.

⁶ *Peltz v. Echole*, 63 Mo. 171. But an action will not lie on a promise made for one entire consideration, a part of which is unlawful as being in restraint of trade, if there has been no apportionment made or means of apportionment furnished by the parties themselves. *Bishop v. Palmer*, 146 Mass. 467; 4 Am. St. Rep. 339.

but the common law is like a nursing father, making only void that part where the fault is and preserves the rest."¹ This distinction is, however, not now regarded,² and if part of an agreement is contrary to statute, this does not avoid or annul other parts which are separable from the bad part, and not founded upon it, unless the statute expressly or by necessary implication declares the whole void.³

§ 340. *Consideration Partly Illegal.*— If any part of a single consideration for one or more promises is illegal the whole agreement is void, for public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal.⁴ And it must be remembered that this rule does not extend to a consideration which is merely void but not illegal, for where the consideration in a contract consists of several matters and is partly void, if any valid consideration remains, it is, in general, sufficient to support the promise; as where part of the stated consideration is impossible or unintelligible, or immaterial, it may be rejected, and the promise supported by that which is valid.⁵

§ 341. *Several Considerations, Some Legal and Some Illegal.*— Where there is one promise made upon several considerations, some of which are bad and some good, the

¹ Pollock on Contr. 321; Anson Contr. 190.

² U. S. v. Bradley, 10 Pet. 343; Hynds v. Hays, 25 Ind. 31; State v. Findley, 10 Ohio 51; Pickering v. R. Co., L. R. 3 O. P. 250.

³ Rand v. Mather, 11 Oush. 1; 59 Am. Dec. 131.

⁴ Bixby v. Moore, 51 N. H. 402; Bank v. Kay, 44 N. Y. 87; Perkins v. Cummings, 2 Gray, 256; Henderson v. Palmer, 71 Ill. 579; Tobey v. Robinson, 99 Ill. 222; Ricketts v. Harvey, 106 Ind. 564; Bishop v. Palmer, 146 Mass. 469; 4 Am. St. Rep.

339; Woodruff v. Hinman, 11 Vt. 592; Snider v. Willey, 33 Mich. 433; Widoe v. Webb, 20 Ohio St. 431; Meguire v. Corwine, 101 U. S. 108; Petit v. Petit, 32 Ala. 288; Chandler v. Johnson, 39 Ga. 85; James v. Jellison, 84 Ind. 292; McQuade v. Rosecrans, 36 Ohio St. 443.

⁵ Shackwell v. Rosier, 3 Bing. N. O. 646; Ring v. Roxbrough, 2 Cromp. & J. 418; King v. Sears, 3 Cromp. M. & R. 48; Guthing v. Lynn, 2 Barn. & Adol. 232; Thomas v. Thomas, 3 Q. B. 851; Jarvis v. Peck, 1 Hoff. Ch. 479; Cobb v. Cowdery, 40 Vt. 25; 94 Am. Dec. 370.

promise is wholly void, for it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise.¹ Thus where a note is given in payment of an account, some of the items of which are legal and some illegal although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void, and the plaintiff cannot recover on the note even to the extent of the lawful items.²

§ 342. Promises and Consideration Severable. —

Where the contract consists of several parts, so that there are several promises based on several considerations, the fact that one or more of these considerations is illegal will not avoid all the promises, if those which were made upon legal considerations are severable from the others.³ Thus where goods are sold at a separate price for each article, and the sale of some of the articles is illegal, an action will lie, nevertheless, for the price of any of the other articles.⁴ But where a contract contains illegal stipulations, and to sustain it in part would be practically to sustain it altogether, the court will treat it as wholly void.⁵ So in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch can be enforced.⁶

¹ *Bredin's Appeal*, 92 Pa. St. 247; *Wisner v. Bardwell*, 38 Mich. 278; *Clark v. Ricker*, 14 N. H. 44; *Sumner v. Summers*, 54 Mo. 340; *Ragnet v. Roll*, 7 Ohio, 78; *St. Louis, etc., R. R. Co. v. Mathers*, 104 Ill. 237; *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422; *Widoe v. Webb*, 20 Ohio St. 431; *Perkins v. Cummings*, 2 Gray, 258; *Trist v. Child*, 21 Wall. 441.

² *Widoe v. Webb*, 20 Ohio St. 431; *Carleton v. Woods*, 28 N. H. 290; *Deering v. Chapman*, 22 Me. 488; *Cotten v. McKenzie*, 57 Miss. 418; *Pacific Guano Co. v. Mullen*, 66 Ala. 582. The contrary was decided in *Shaw v. Carpenter*, 54 Vt. 155; and *Hynds v. Hays*, 25 Ind. 31.

³ *Shackwell v. Roister*, 2 Bing. N. O. 634; *Jarvis v. Peck*, 1 Hoff. Ch. 479; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370; *Robinson v. Green*, 3 Metc. 159; *Carleton v. Woods*, 28 N. H. 290.

⁴ *Boyd v. Eaton*, 44 Me. 51; 69 Am. Dec. 83; *Carleton v. Woods*, 28 N. H. 290.

⁵ *Burlington, etc., R. R. Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 652; *Gerlach v. Skinner*, 34 Kan. 86; 55 Am. Rep. 240.

⁶ *Hanauer v. Gray*, 25 Ark. 350; 99 Am. Dec. 226.

§ 343. **The Unlawful Intention.** — Where the direct object of the parties is to do an illegal act the contract is void, and it does not matter whether or not they knew that the object was illegal, for ignorance of the law excuses no one.¹ And where the object or consideration is not illegal, but the illegality consists in the intention of one or both of the parties to further an illegal purpose, then if this unlawful intention is at the time common to both parties the agreement is void. But where one of two parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into it in ignorance of his intention, the innocent party may, while the contract is still executory, avoid it at his option.² So where the intention of one of the parties to a contract is lawful and the contract is capable of being executed in a lawful manner, he is entitled to full benefits under the contract, whatever may have been the secret intention of the other party.³

§ 344. **Knowledge of Illegal Intention — The English Rule.** — Where the direct object of the agreement is unlawful the agreement is void. And where an agreement innocent in itself is designed by one of the parties to

¹ Pollock Contr. 323; Anson Contr. 192; *Favor v. Philbrick*, 7 N. H. 336. See *Waugh v. Morris*, L. R. 8 Q. B. 202, where the illegal intent being absent, the contract was held not void.

² In *Cowan v. Milbourn*, L. R. 2 Ex. 230 the plaintiff sued the defendant for breach of an agreement to let him a set of rooms. It appeared that the plaintiff intended to use the rooms for the purpose of delivering lectures which were unlawful, as being blasphemous within the meaning of a statute. The defendant was not aware of the use to which the plaintiff meant to put the rooms at the time the agreement was made; and he subsequently refused to allow the plaintiff to use them, though he did not at first allege the character of the lectures as the ground of his refusal. It was held that he was entitled to void the

contract, and was not bound to give his reasons. It is held in the United States that if a lease is executed and possession given it does not become forfeited upon the lessee subsequently using the premises for an unlawful purpose even though he had such intention at the time he took the lease. *Sprague v. Rooney*, 82 Mo. 433; 52 Am. Dec. The lessor's remedy in case the lessee uses the premises for a bawdy house is under the statute against disorderly persons. *O'Brien v. Bristenbach*, 1 Illt. 394. Summary proceedings to eject the tenant where he uses the premises for an illegal purpose is provided for in various States. See *Prescott v. Kyle*, 103 Mass. 381; *Justice v. Lowe*, 26 Ohio St. 370; *McGarvey v. Prickett*, 27 Ohio St. 669.

³ *Pixley v. Boynton*, 79 Ill. 351; *Quirk v. Thomas*, 6 Mich. 76.

further an illegal purpose the courts will not enforce it in favor of such party. These propositions are elementary and not denied. But when the question is whether the courts will enforce it in favor of the other party to the agreement when it is found that he knew of the illegal design, we encounter a difference of opinion. Since the case of *Pearce v. Brooks*,¹ the English rule may be stated thus: "It is not necessary that the parties to a contract *prima facie* innocent should bind themselves to adapt it to an illegal purpose in order to avoid it. It is enough that the one party knows the unlawful intent of the other and that the contract is intended to be applied by the latter to its illegal purpose."² In *Pearce v. Brooks*, an action was brought by coach builders to recover payment for the hire of a carriage engaged by a prostitute. It was proved that the plaintiffs knew that the defendant was a prostitute, and that they knew (as the jury found) that she intended to use it in her trade. On appeal the court held that they could not recover, on the ground that a person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover for the thing so supplied. And on the same principle money lent by one to another knowing that he intends to use it for an illegal purpose, as, for example, gambling, cannot be recovered by the lender.³

§ 345. **Knowledge of Illegal Intention — The American Doctrine.** — The American doctrine is in conflict with *Pearce v. Brooks*, and agrees substantially with the remarks of Bramwell, B, in that case. "My difficulty," said he, "was whether though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one

¹ L. R. 1 Ex. 213.

³ *Cannan v. Bryce and McKinnell v.*

² *Cannan v. Bryce*, 3 B. & Ald. 179; *Robinson, supra.*
McKinnell v. Robinson, 3 M. & W. 435.

sense it was not for the same purpose. If a man were to ask for dueling pistols, and to say, 'I think I shall fight a duel to-morrow,' might not the seller answer, 'I do not want to know your purpose; I have nothing to do with it; that is your business; mine is to sell the pistols, and I look only to the profit of trade.' No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of previous cases¹ concludes the matter." Though there is some conflict in the decisions,² the weight of authority in the United States sustains the distinction and lays it down that the mere knowledge of a vendor of property that the vendee intends to make an illegal use of it, is no defense to an action for the price.³ Therefore, it is no defense to an action for goods sold and delivered, that the plaintiff knew that the defendant was a prostitute, and that they were intended to be used by her in her trade;⁴ or to an action on a contract for the purchase of a house that the vendor knew that the vendee intended it for his mistress;⁵ or to an action for rent that the lessor knew that the lessee intended to use the premises for an unlawful purpose;⁶ or to an action for work done and materials furnished in fitting up a house that the work was done and the materials furnished with the knowledge of the plaintiff that the defendant intended to use the house as a gambling house;⁷ or to an action for

¹ *Cannan v. Bryce and McKinnell v. Robinson*, *supra*.

² See *Adams v. Coulliard*, 102 Mass. 167; *Sherman v. Wilder*, 106 Mass. 537; *Finch v. Mansfield*, 97 Mass. 89; *Riley v. Jordan*, 123 Mass. 231; *Wilson v. Stratton*, 47 Me. 120; *McConike v. McMann*, 27 Vt. 95; *Territt v. Bartlett*, 21 Vt. 184.

³ *Tracy v. Talmage*, 14 N. Y. 163; 67 Am. Dec. 132; *Hannauer v. Doane*, 12 Wall. 343, 349; *Michael v. Bacon*, 49 Mo. 474; 8 Am. Rep. 138; *Curran v. Downs*, 3 Mo. App. 471; *Rose v. Mitchell*, 6 Col. 103; *Hill v. Spear*, 50 N. H. 253; *Gaylord v. Soragen*, 32 Vt. 110; *Webber v. Donnelly*, 33 Mich. 469; *McKinney v. An-*

draws, 41 Tex. 363; *Hedges v. Wallace*, 2 Bush. 443; 92 Am. Dec. 497; *Cheney v. Duke*, 10 G. & J. 11; *Steele v. Curle*, 4 Dana, 381; *Bishop v. Honey*, 34 Tex. 252; *De Groot v. Van Deuzer*, 17 Wend. 170; *Bickel v. Sheets*, 24 Ind. 1; *Green v. Collins*, 3 Chff. 494.

⁴ *Hubbard v. Moore*, 24 La. Ann. 591; 18 Am. Rep. 128; *Sampson v. Townsend*, 25 La. Ann. 78; *Anheuser Busch Brew. Assn. v. Mason*, 44 Minn. 318; 20 Am. St. Rep. 580.

⁵ *Armfold v. Tate*, 7 Ired. 253.

⁶ *Updike v. Campbell*, 4 E. D. Smith, 570; *Lyman v. Townsend*, 24 La. Ann. 625.

⁷ *Michael v. Bacon*, 49 Mo. 474; 8 Am. Rep. 138.

money lent, that the plaintiff knew that the money was to be used in gambling or for some other illegal purpose;¹ or to an action for goods sold and delivered, that the vendor knew that the purchaser bought them to resell them in a State where the sale of such goods was unlawful.²

§ 346. **Exceptions to the American Doctrine.** — To the doctrine stated in the last section there are two exceptions, viz.: (a) Where the contemplated illegal act is of a highly heinous character; (b) where the vendor does something beyond making the sale, in aid or furtherance of the unlawful design.

(a) There may be cases, though likely to be of rare occurrence, where the bare knowledge of the use to which the article sold is to be put will prevent recovery of the price. If a person sells arsenic with knowledge that the purchaser intends to poison another with it, the enormity of the offense intended is such as to render it morally certain that the conscience of the seller would have prevented him from making the sale had he not participated in the design.³ In a Missouri case⁴ it is said: "*Aside from felonies or crimes involving great moral turpitude, the mere knowledge of the lender or vendor, that the money loaned or the property sold is designed to be applied to an unlawful purpose, will not prevent a legal recovery based on such loan or sale.*" In the case of contracts made during the late war for supplies to be used by the Confederates in aid of the rebellion, when the question came before the Supreme Court of the United States in *Hanauer v. Doane*,⁵ it was decided that no action could be

¹ *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354; *Jones v. Bank*, 9 Helsk. 455; *McGavock v. Puryear*, 6 Cold. 34; *Howell v. Stewart*, 54 Mo. 400; *Walker v. Jeffries*, 45 Mass. 160; *Lewis v. Alexander*, 51 Tex. 578; *Henderson v. Waggoner*, 2 Lea, 133.

² *Hill v. Spear*, 50 N. H. 253; *Webber*

v. Donnelly, 33 Mich. 469; *Sortwell v. Hughes*, 1 Curt. 444; *Jameson v. Gregory*,

⁴ Met. 363; *Smith v. Godfrey*, 28 N. H. 379.

³ Benj. Prin. of Contr. 97; *Hanauer v. Doane*, 12 Wal. 342; *Tracy v. Talmage*, 14 N. Y. 215; *Tatum v. Kelley*, 25 Ark. 209.

⁴ *Howell v. Stewart*, 54 Mo. 402.

⁵ 12 Wall. 342.

maintained on such contracts, on the ground that the vendor knew that the property was to be employed in the commission of a criminal act, the court saying: "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime and that they were procured for that purpose."

(b) If it appears from some stipulation or act of the party¹ or from the circumstances of the case² that he made the contract or the sale as the case may be with the view of aiding in the accomplishment of such purpose, he cannot recover. If in addition to knowledge of the illegal intention there is any participation in it on his part, he is guilty in the eye of the law.³ Thus, in the case of the purchase by a prostitute given in the last section if it was shown that the seller expected to be paid from the profits of the vendee's prostitution, or that he sold the goods to enable her to carry it on, "so that he might appear to have done something in furtherance of it," he could not recover the price.⁴ So, though one may lawfully sell goods to another, although he knows the buyer intends to smuggle them into another country and to evade the revenue laws, and this is no defense to an action for the price, yet if the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis* and cannot recover.⁵

¹ *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 538; *Gaylord v. Soragen*, 33 Vt. 110; *Aiken v. Blaisdell*, 41 Vt. 635; *Bancher v. Mansel*, 47 Me. 58; *Skiff v. Johnson*, 57 N. H. 475; *Foster v. Thurston*, 11 Cush. 323; *Webster v. Munger*, 8 Gray, 584; *Ralston v. Brady*, 20 Ga. 449.

² *White v. Buss*, 3 Cush. 448; *Tracy v. Talmage*, 14 N. Y. 214; 67 Am. Dec. 182.

³ *Cooper v. Thompson*, 20 La. Ann. 182; 96 Am. Dec. 372; *Cheaney v. Duke*, 10 S. & J. 11.

⁴ *Hubbard v. Moore*, 24 La. Ann. 591; 13 Am. Rep. 128; *Sampson v. Townshend*, 25 La. Ann. 78.

⁵ See *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, reviewing the cases of *Holman v. Johnson*, Cowp. 341; *Briggs v. Lawrence*, 3 Term Rep. 454; *Clugas v.*

In *Skiff v. Johnson*¹ the plaintiffs sold to the defendant goods, with the knowledge that she intended to make an unlawful use of them; and to enable her to make such unlawful use, by her direction, put them up in packages in a convenient form for sales in violation of the law, with labels thereon calculated to facilitate such sales. It was held that the parties were *in pari delicto*, and that the plaintiffs could not recover the price. The same conclusion was reached where the plaintiff, having a reputation as a seedsman, sold to the defendant a large quantity of empty bags for seeds with the plaintiff's label, the same to be filled by the purchaser with seeds, and sold in a certain county named in the contract, and not elsewhere; and where a contract was made for the sale of domestic sardines, to be put up with labels representing the sardines as foreign sardines.² It is on this ground that it is held in numerous cases that one loaning money with a knowledge that it is to be used for an illegal purpose, as for gambling, cannot recover the loan. No legal distinction can be drawn between a loan of money and a sale of goods as affecting this question, but money is frequently, if not in the majority of cases, loaned to assist another in some undertaking; and if the undertaking be illegal, as for instance a gambling transaction, the lender, knowing of the borrower's intention and assisting by way of a loan, will be deprived of his right to recover the money loaned.³ The rule is perhaps best expressed in a late Pennsylvania case where it is said that to invalidate a loan for a gambling transaction, the lender must not only have known the use intended, but must have

Penaluna, 4 Term Rep. 486, and Waymell v. Reed, 5 Term Rep. 590.

¹ 57 N. H. 475.

² *Bliss v. Bloomer*, 23 Barb. 604; *Materne v. Howitz*, 101 N. Y. 24.

³ Mr. Knowlton's notes to Anson Contr. 192, citing *Culler v. Welsh*, 43 N. H. 498; *White v. Buss*, 3 Cush. 450; *Ruckman v. Bryan*, 3 Denio, 310; *Peck v. Briggs*, 3 Denio, 107; *Mordecai v. Daw-*

kins, 9 Rich. (S. O.) 262; 1 Danl. on Neg Inst. 173; *Williamson v. Bailey*, 78 Mo. 636; *Critchler v. Holloway*, 64 N. O. 526; *Viser v. Bertrand*, 14 Ark. 267; *Raymond v. Leavitt*, 46 Mich. 447; and see *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354; *Morgan v. Groff*, 5 Denio, 364; 49 Am. Dec. 278; *Tyler v. Carlisle*, 79 Me. 210; 1 Am. St. Rep. 301.

been implicated as a confederate, though not necessarily for gain.¹

§ 347. **Agreements Legal in One Place Illegal in Another — Conflict of Laws in General.**— This subject being only a part of a larger subject, viz., the effect of a conflict of laws upon the interpretation, the validity and the enforcement of contracts, it is proposed here to state the main rules as to contracts, as affected by a difference in local laws. It must be borne in mind that the subject of conflict of laws rests entirely upon the comity of nations. The law of one state has no force or authority beyond the jurisdiction of its own courts.² Whatever effect is given to it by the courts of foreign countries or other States is the result of that international comity which is the product of modern civilization. It is left to each nation to say how far it will recognize this comity and to what extent it will be permitted to control its own laws. And because the effect of a foreign law depends so largely upon State comity there is, as would naturally be expected, considerable conflict in the authorities where the laws conflict.³

In the law of contracts, however, the following rules are well-settled.

1. The validity of a contract, its interpretation and enforcement, are to be determined by the *lex loci contractus* or law of the place where it is made;⁴ unless it is to be

¹ *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354.

² *People v. McLeod*, 1 Hill, 377; 25 Wend. 483; 37 Am. Dec. 328; *Dearing v. Bank*, 5 Ga. 497; 48 Am. Dec. 300; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Roche v. Washington*, 19 Ind. 53; 81 Am. Dec. 276.

³ *Lawson Rights*, Rem. & Pr., § 3715.

⁴ *Harrison v. Sterry*, 5 Cranch. 289; *Aymar v. Sheldon*, 12 Wend. 439; 27 Am. Dec. 187; *Laird v. Hodges*, 26 Ark. 356; *Gilman v. Stevens*, 63 N. H. 342; *Marvin Safe Co. v. Norton*, 48 N. J. (L.) 415; 57 Am. Rep. 566; *Fritchard v. Norton*, 106

U. S. 124; *Warder v. Arell*, 2 Wash. (Va.) 232; 1 Am. Dec. 488; *Smith v. Smith*, 2 Johns. 235; 8 Am. Dec. 410; *Thompson v. Ketcham*, 8 Johns. 190; 5 Am. Dec. 332; *Touro v. Cassin*, 1 Nott & McC. 173; 9 Am. Dec. 683; *Lynch v. Postlethwaite*, 7 Mart. 69; 12 Am. Dec. 495; *Baldwin v. Gray*, 4 Mart. N. S. 192; 16 Am. Dec. 169; *Thorn v. Morgan*, 4 Mart. N. S. 292; 16 Am. Dec. 173; *Dougherty v. Snyder*, 15 Serg. & R. 84; 16 Am. Dec. 530; *Mills v. Oden*, 8 Mart. N. S. 214; 19 Am. Dec. 177; *Malpica v. McKown*, 1 La. 248; 20 Am. Dec. 279; *Arayo v. Currell*, 1 La. 528; 20 Am. Dec. 286; *Clague v. Creditors*, 2 La.

performed in another country, in which case it will be governed by the law of the place of performance.¹ Thus a contract of carriage of goods from one country to another is governed by the laws of the country where it is made;² but so far as the contract is to be performed in one State it is to be governed by the laws of that State.³ So, the validity of a bill or note as regards its requisites of form is to be determined by the law of the place of issue;⁴ and the validity of supervening contracts as acceptance or indorsement by the law of the place where such contract is made.⁵ So, any negotiable instrument is to be interpreted according to the law of the place where it was made,⁶ but when notes are made in one State for delivery in another, the law of the latter State governs the contract.⁷

2. A contract contrary to common principles of justice and morality, though legal where it was made, will not be

114; 20 Am. Dec. 300; *King v. Harman*, 6 La. 607; 26 Am. Dec. 485; *Suffolk Bk. v. Kidder*, 12 St. 464; 36 Am. Dec. 354; *Harrison v. Edwards*, 13 Vt. 648; 36 Am. Dec. 365; *Buckner v. Watt*, 19 La. 216; 36 Am. Dec. 671; *Lane v. Levillian*, 4 Ark. 76; 37 Am. Dec. 769; *Whidden v. Seelye*, 40 Me. 247; 63 Am. Dec. 667; *Spear v. Shropshire*, 11 La. Ann. 539; 66 Am. Dec. 206; *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540; *King v. Sarria*, 69 N. Y. 24; 25 Am. Dec. 128.

¹ Story's Conflict of Laws, § 280; *Andreas v. Pond*, 13 Pet. 65; *Warder v. Arill*, 2 Wash. (Va.) 282; 1 Am. Dec. 488; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410; *DeSobry v. LaLaitre*, 2 Har. & J. 191; 3 Am. Dec. 535; *Smith v. Mead*, 3 Conn. 253; 8 Am. Dec. 183; *Baxter v. Willey*, 9 Vt. 276; 31 Am. Dec. 623; *Larrabee v. Talbot*, 5 Gill, 426; 46 Am. Dec. 637; *Strowbridge v. Robinson*, 5 Glim. 470; 50 Am. Dec. 420; *Kanaga v. Taylor*, 7 Ohio St. 184; 70 Am. Dec. 62; *Wyse v. Dandridge*, 35 Miss. 672; 73 Am. Dec. 149; *Kennedy v. Knight*, 21 Wis. 340; 94 Am. Dec. 543; *Dunn v. Welsh*, 62 Ga. 241; *Clampson v. Wilson*, 64 Ga. 184; The presumption is that the place of performance is the place of execution.

Allshouse v. Ramsey, 6 Whart. 331; 37 Am. Dec. 417; *Jones v. Perkins*, 29 Miss. 139; 64 Am. Dec. 136. See *Schnessaler v. Watson*, 37 Ala. 93; 76 Am. Dec. 348.

² *Cantu v. Bennett*, 39 Tex. 303; *Penisular, etc., Steam Nav. Co. v. Shand*, 11 Jur. (N. S.) 771; *Pennsylvania Co. v. Fairchild*, 99 Ill. 268.

³ *Rixford v. Smith*, 53 N. H. 355; 13 Am. Rep. 42; *Brown v. R. R. Co.*, 83 Pa. St. 316; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106.

⁴ *Benjamin's Chalmers Dig., Art. 69*; *Ticknor v. Roberts*, 11 La. 14; 30 Am. Dec. 706; *Smith v. Blatchford*, 3 Ind. 184; 52 Am. Dec. 504.

⁵ *Benjamin's Chalmers Dig., Art. 69*; *Mendenhall v. Gately*, 18 Ind. 149; *Carnegie v. Morrison*, 3 Met. 381; *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 62; *Scudder v. Union Bk.*, 91 U. S. 406; *Mason v. Dunsay*, 35 Ill. 424; 85 Am. Dec. 368. But see *Stanford v. Pruet*, 27 Ga. 243; 73 Am. Dec. 734.

⁶ *Peck v. Hibbard*, 26 Vt. 698; 63 Am. Dec. 605; *Ayer v. Tilden*, 15 Gray, 178; 77 Am. Dec. 355; *Kuenzie v. Elvers*, 14 La. Ann. 391; 74 Am. Dec. 434; *Emerson v. Patridge*, 27 Vt. 8; 62 Am. Dec. 617.

⁷ *Com. Bk. v. Simpson*, 90 N. C. 467.

enforced in the courts of another State or country;¹ nor where it is contrary to the statutes or public policy of the latter State or is to the detriment of its citizens.² A State will not enforce contracts made elsewhere by its citizens if they are in violation and fraud of its laws;³ and a contract void where made, is void everywhere.⁴ It has been held that contracts to bribe or corruptly influence officers of a foreign government, even if not prohibited by the law of that government, will not be enforced in the courts of the United States;⁵ and this is not in the interest of the foreign government, but for the sake of morality and the dignity of the law at home.

So, though a marriage valid where it is celebrated is valid everywhere,⁶ and if the marriage is invalid in the country where it is celebrated it is invalid everywhere,⁷ yet there are two necessary exceptions to this general rule and two cases in which a marriage though perfectly valid in the country where made, will not be recognized as legal in

¹ *De Sobry v. De Laistre*, 2 Harr. & J. 191; 3 Am. Dec. 535; *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 63; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617.

² *Parsons v. Trask*, 7 Gray, 463; 66 Am. Dec. 502; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Walters v. Whitlock*, 9 Fla. 86; 76 Am. Dec. 607; *Stricker v. Tinkham*, 35 Ga. 176; 89 Am. Dec. 280; *Galland v. Pierre*, 18 La. Ann. 10; 89 Am. Dec. 643; *Thurston v. Rosenfeld*, 42 Mo. 474; 97 Am. Dec. 351; *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475; *Mumford v. Cary*, 50 Ill. 370; 99 Am. Dec. 525; *Donovan v. Pitcher*, 38 Ala. 411; 25 Am. Rep. 634.

³ *Hinds v. Brassealle*, 2 How. (Miss.) 327; 32 Am. Dec. 307.

⁴ *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475; *Ford v. Ins. Co.*, 6 Bush, 133; 89 Am. Dec. 663; *Blackwell v. Webster*, 23 Blatchf. 537; *Satterthwaite v. Doughty*, Busb. 314; 59 Am. Dec. 554; *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 657.

⁵ *Oscanyon v. Arms Co.*, 103 U. S. 261.

⁶ *Bishop on Marriage and Divorce*,

§ 123; *Story's Conflict of Laws*, §§ 79-81; *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395; *Herbert v. Herbert*, 2 Hagg. Const. 271; *Warrender v. Warrender*, 9 Bligh, 89; *Munro v. Saunders*, 6 Bligh, 468; *Commonwealth v. Hunt*, 4 Cush. 49; *Sutton v. Warren*, 10 Met. 457; *Wall v. Williamson*, 8 Ala. 48; *Morgan v. McGee*, 5 Humph. 13; *Phillips v. Gregg*, 10 Watts, 158; 36 Am. Dec. 158; *Fornhill v. Murray*, 1 Bland, 479; *Patterson v. Gaines*, 6 How. 550; *Dumarsely v. Fishly*, 3 A. K. Marsh. 366; *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699.

⁷ *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131; *Putnam v. Putnam*, 8 Pick. 433; *West Cambridge v. Lexington*, 1 Pick. 506; 11 Am. Dec. 241; *Ryan v. Ryan*, 2 Phil. Ecc. 339; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; *Ruding v. Smith*, 2 Hagg. Const. 390; *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395; *Munro v. Saunders*, 6 Bligh, 473; *Ilderton v. Ilderton*, 2 H. Black, 145; *Middleton v. Jaurelin*, 2 Hagg. Const. 437; *Lacon v. Higgins*, 3 Stark, 178; *Kent v. Burgess*, 11 Sim. 361.

another. These are, first, where the marriage is of a kind abhorred by the law of christian countries, as, for example, an incestuous or a polygamous marriage;¹ second, where it is of a kind prohibited by the positive law of the country in which it is sought to be recognized.²

§ 348. **Agreements Legal at one Time and Illegal at Another.**—A lawful contract cannot become in itself unlawful by a subsequent change in the law,³ and therefore if an agreement when entered into is legal, and is afterwards made by statute illegal, acts done under it while it remained legal are legal.⁴

But a contract is discharged by illegality occurring by a change in the public law subsequent to the time of contracting.⁵ “Where a man covenants not to do a thing which was lawful for him to do, and an act of Parliament comes after and compels him to do it, there the act repeals the covenant; and *vice versa*, if he covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed.”⁶

On the other hand where a statute is in force at the time a contract is entered into, which makes it illegal, no action can be maintained on it though the statute is afterwards repealed.⁷ And “where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant.”⁸

A contract which provides for something, known to the

¹ Pennegar v. State, 87 Tenn. 244; 10 Am. St. Rep. 648; Wall v. Williamson, 8 Ala. 48; Sneed v. Ewing, 5 J. J. Marsh. 480; 22 Am. Dec. 41; Sutton v. Warren, 10 Met. 451; Greenwood v. Curtis, 6 Mass. 378; 4 Am. Dec. 145; Swift v. Keely, 3 Knapp, 358; Hyde v. Hyde, L. R. 1 Pro. & D. 130; 3 Kent's Com. 81; 1 Bla. Com. 436.

² Pennegar v. State, *supra*.

³ Pollock Contr. 347.

⁴ Bennett v. Woolfolk, 15 Ga. 218.

⁵ Leake Contr. 783; see *post*, IMPOSIBILITY OF PERFORMANCE.

⁶ Brewster v. Kitchen, 1 Salk. 198.

⁷ Woods v. Armstrong, 34 Ala. 150; Ludlow v. Hardy, 38 Mich. 690; Webber v. Howe, 36 Mich. 150; Mitchell v. Doggett, 1 Fla. 356; Anding v. Levy, 57 Miss. 51; Robinson v. Barrows, 48 Me. 186; Gilliland v. Phillips, 1 S. C. 152.

⁸ Brewster v. Kitchen, 1 Salk. 198.

parties to be not lawful at the time, being done in the event and only in the event of its being made lawful, is free from objection and valid as a conditional contract;¹ unless indeed the thing were of such a kind that its becoming lawful could not be properly or seriously contemplated.

§ 349. *Securities Given on Illegal Transaction.* — Repeating a promise which is void for illegality cannot give it any validity. Therefore if a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery.² In the leading case (in England) of *Fisher v. Bridges*³ the plaintiff sued the defendant upon a covenant to pay a sum of money. The defense was that the covenant was security for the payment of a sum of money due upon a purchase of land agreed to be sold for a purpose declared to be illegal by statute. The lower court ruled that the defendant was bound, inasmuch as there was nothing unlawful in a simple promise to pay money. But on appeal it was held that the illegality when proved tainted the subsequent promise, and that this was not a simple promise to pay money, but that it “sprang from and was the creature of an illegal transaction.” This principle is well settled in our courts and no writing, seal or other solemnities in the formation of the contract will preclude the court from receiving oral evidence to show that the transaction was illegal and the instrument therefore void. The defense of illegality is allowed, not as a favor to or in the interest of either of the contracting parties, but in the interest of the public.⁴ Therefore deeds, bonds or other securities given for illegal debts are invalid and not enforceable.⁵

¹ *Taylor v. Chichester, etc., R. Co., L. R. 4 H. L. 628; Mayor of Norwich v. Norfolk R. Co., 4 E. & B. 397; 24 L. J. Q. B. 105.*

² *Comstock v. Draper, 1 Mich. 481; 33 Am. Dec. 78.*

³ *El. & Bl., 642.*

⁴ *Lyon v. Waldo, 36 Mich. 353; Parks v. McKamy, 3 Head (Tenn.), 297; Wood- en v. Shotwell, 23 N. J. (L.) 465; Buffen- deau v. Brooks, 28 Cal. 641; Seidenben- der v. Charles, 4 S. & R. 151.*

⁵ *Morton v. Fletcher, 2 A. K. Marsh.*

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties to the contract, but its effect upon subsequent holders of the instrument. In these cases, as already noticed,¹ the ordinary presumption in favor of the holder of such an instrument does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder is liable to have to show that he is a holder for value; that is to say, that he gave consideration for the bill; and even then, if he can be proved to have been aware of the illegality, he will be disentitled to recover. But illegality of consideration is no defense to a negotiable instrument that has passed into the hands of a *bona fide* purchaser, unless the statute expressly or by necessary implication declares that the instrument given on such illegal consideration shall be absolutely void;² for where the note is expressly made *void* by statute, even a *bona fide* holder cannot recover on it.³

§ 350. Distinction between "Void," "Voidable" and "Unenforceable." — A contract is either "void," "voidable" or "unenforceable." A void contract is one destitute of legal effect. It is a mere nullity and good for no purpose whatever. It is binding upon neither party and

187; 12 Am. Dec. 386; Edgell v. McLaughlin, 6 Whart. 176; 38 Am. Dec. 214; Shropshire v. Glasscock, 4 Mo. 536; 31 Am. Dec. 189; Russell v. Ryland, 2 Humph. 131; 38 Am. Dec. 307; Bettis v. Reynolds, 12 Ired. 344; 55 Am. Dec. 417; Foreman v. Hardwick, 10 Ala. 316; Jordan v. Locke, Minor, 254; Monro v. Smelly, 25 Tex. 586; 78 Am. Dec. 541; Hockaday v. Willis, 1 Spear, 379; 40 Am. Dec. 606; Stone v. Mitchell, 7 Ark. 91; Chiles v. Coleman, 2 A. K. Marsh. 386; 12 Am. Dec. 386; Turner v. Peacock, 2 Dev. 303.

¹ See *ante*, §91.

² Vallett v. Parker, 6 Wend. 615; Town of Eagle v. Kohn, 84 Ill. 292; Glenn v.

Farmers' Bank, 70 N. C. 191; Paton v. Colt, 5 Mich. 508; Root v. Merriam, 27 Fed. Rep. 209; Fuller v. Green, 64 Wis. 159; Cunningham v. National Bank of Augusta, 71 Ga. 400; Traders' Bank v. Alsop, 64 Iowa, 97; Jones v. Sevier, 1 Litt. 50; 13 Am. Dec. 218; Bell v. Parker, 3 Dana, 51; 28 Am. Dec. 55; Haight v. Joyce, 2 Cal. 64; 56 Am. Dec. 311.

³ Aurora v. West, 22 Ind. 88; Unger v. Boas, 13 Pa. St. 601; Bridge v. Hubbard, 15 Mass. 96; Andrews v. Hoxie, 5 Tex. 171. See Chapin v. Dake, 57 Ill. 286; 11 Am. Rep. 15; Harman v. Boyce, 2 Tread. Const. 207; Holman v. Ringo, 36 Mass. 690; Williams v. Judy, 3 Glim. 282; 44 Am. Dec. 697.

may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded and it cannot be ratified and made valid. Of this nature are all of the contracts considered in this chapter except one or two classes which have been already noticed as exceptions.¹

A "voidable" contract is one that is good both as between the parties to it and as to third persons, until it is avoided by the party entitled to avoid it. It is valid and binding until thus disaffirmed and its infirmity may be completely cured by a ratification by the party at whose instance it might have been avoided. Of this class are those in which one of the parties has a legal incapacity or where the contract lacks the element of consent or wants a legal consideration.²

An "unenforceable contract" is one that, while perfectly valid, is incapable of proof pending the fulfillment of certain conditions. A contract which is unenforceable cannot be set aside at the option of one of the parties to it: the obstacles to its enforcement do not touch the existence of the contract, but only set difficulties in the way of action being

¹ The word "void" is sometimes used in statutes and very frequently in the reports where the word "voidable" is intended to be used. For the construction of the word "void" see *Fuller v. Hasbrouck*, 46 Mich. 82; *Allis v. Billings*, 6 Metc. 417; *Somes v. Brewer*, 2 Pick. 191; *Anderson v. Roberts*, 18 Johns. 527; *Slocum v. Hooker*, 13 Barb. 537; *Roberts v. Davey*, 4 B. & Adol. 672; *Williams v. Albany City Ins. Co.*, 19 Mich. 451; *Goldsmith v. Hampton*, 5 O. B. (N. S.) 108; *King v. Inhabitants*, 8 B. & O. 470; *Thornton v. McGrath*, 1 Duv. 352; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Alexander v. Nelson*, 42 Ala. 462; *Van Schaack v. Robbins*, 36 Iowa, 301; *Brown v. Brown*, 50 N. H. 538; *Inskip v. Lecony*, 1 N. J. (L.) 111; *Kearney v. Vaughan*, 50 Mo. 284; *Crocker v. Bellangee*, 6 Wis. 645; *Bromley v. Goodrich*, 40 Wis. 131; *An-*

derson v. Roberts, 18 Johns. 515; *Pearsall v. Chapin*, 44 Pa. St. 9; *Hone v. Woolsey*, 2 Edw. Ch. 289. As to construction of "voidable" see *Pearsall v. Chapin*, 44 Pa. St. 15; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; Am. Dec. 71; *Alexander v. Nelson*, 42 Ala. 462; *Slocum v. Hooker*, 13 Barb. 537; *Bromley v. Goodrich*, 40 Wis. 131; *Crocker v. Bellangee*, 6 Wis. 645. In *Beecher v. Marq. & Pac. R. M. Co.*, 45 Mich. 108, Cooley, J., said: "If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *not* *juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it."

² See *ante*, chap. VI.

brought or proof given. Of this class are contracts which fail to comply with the provisions of the Statute of Frauds, and so cannot be proved ; or contracts by word of mouth or in writing which are required by statute or law to be in writing or under seal, or contracts which have fallen under the Statute of Limitations, and can only be revived by an acknowledgment in writing.

PART II.

THE OPERATION OF THE CONTRACT.

CHAPTER VIII.

THE ASSIGNMENT OF THE CONTRACT.

SECTION 351. Introductory.

(a) *Assignment by Act of Parties.*

- 352. Assignment of liabilities.
- 353. Assignment of rights — choses in action not assignable at common law.
- 354. Assignment of rights — rule in equity.
- 355. What may not be assigned.
- 356. Notice of assignment necessary.
- 357. Form of notice.
- 358. Assignee takes subject to equities.
- 359. Equities excluded by contract or conduct.
- 360. Debtor's assent immaterial.
- 361. What passes on assignment.
- 362. Liability of assignor.
- 363. Assignment by statute.
- 364. Assignability distinguished from negotiability.
- (b) *Assignment by Operation of Law.*
- 365. Assignment by marriage.
- 366. Assignment by death.
- 367. Assignment by bankruptcy.
- 368. Interests in lands.

§ 351. Introductory. — We have seen that the common law rule was that no one but the parties to a contract could be bound by it or entitled to claim rights under it.¹ Nevertheless, the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, and thus what is called Assignment may take place by (a) the act of the parties, or (b) by operation of law.

(a) *Assignment by Act of Parties.*

§ 352. Assignment of Liabilities. — A liability under a contract cannot be assigned to another, and a person can-

¹ *Ante*, § 113.

not be compelled to accept performance of the contract from one who was not a party to it. This rule rests upon the ground that "you have a right to the benefit you contemplate from the character, credit and substance of the person with whom you contract."¹ Thus A owes B \$100, A cannot assign his debt to C so as to make B collect his debt from C and not from A.² So, if A agrees to do a certain piece of work for B requiring skill, B cannot be compelled to accept performance from C, to whom A has assigned the contract.³ Yet, if A undertakes to do a thing for B which needs no special skill and it appears that A was not selected on account of any personal qualification, it seems that B cannot complain if A gets the thing done by an equally competent person.⁴

§ 353. **Assignment of Rights — Choses in Action not Assignable at Common Law.** — At common law a *chose in action*, as it is called, *i. e.*, the right which a person possesses under a contract, cannot be assigned so as to enable the assignee to sue upon it in his own name. This rule was based not only on the old view of a contract as creating a strictly personal obligation between the parties, but on the policy of the law to discourage maintenance and litigation.⁵ But the rule did not affect the substantial rights of the assignee, for the common law so far takes cognizance of such equitable rights as are created by the assignment that the name of the assignor may be used as trustee of the benefits of the contract for the assignee;⁶ the assignee

¹ *Humble v. Hunter*, 12 Q. B. 317.

² *Jones v. Walker*, 2 Paine, 687; *Van Scott v. Lefferts*, 11 Barb. 140; *Cannon v. Kreipe*, 14 Kan. 324.

³ *Robson v. Drummonds*, 2 B. & Ad. 303. Where the creditor consents at the debtor's request to accept another person as his debtor in the place of the first, there is not any assignment, but the rescission, by agreement, of the contract and the substitution of a new one in

which the same acts are to be performed by different persons. It is called in law a *novation*. See *post*, § 398.

⁴ *Anson Contr.* 219; *British Wagon Co. v. Lea*, 5 Q. B. Div. 149.

⁵ *Pollock Contr.* 207; *Beecher v. Buckingham*, 18 Conn. 110; 44 Am. Dec. 530.

⁶ *Caister v. Eccles*, 1 Ld. Ray. 633; *McWilliam v. Webb*, 32 Ia. 577; *Halloran v. Whitcomb*, 43 Vt. 306; *Fay v. Guynon*, 131 Mass. 31.

must sue in the name of the assignor or his representatives,¹ unless the debtor has expressly promised the assignee to be responsible to him.²

§ 354. *Rule in Equity.*—The strict rule of the common law was not followed in courts of equity, which always allowed the assignment of a *chose in action* (where the contract was not for exclusively personal service) and the bringing of the suit by the assignee in his own name;³ and no particular form was required,⁴ any order, writing or act whose intent is to make an assignment or to appropriate a particular right or fund due the assignor to the assignee being recognized as a valid equitable assignment.⁵ But a court of equity will not entertain a bill by the assignee of a strictly legal right merely upon the ground that he cannot bring an action at law in his own name nor unless it appears that the assignor prohibits and prevents such an action from being brought in his own name or that an action so brought would not afford the assignee an adequate remedy.⁶

(a) *Part of Claim.* And while at law the assignment of a part of a claim was not allowed, because the debtor had a right to discharge his debt in full at one time and not in parcels,⁷ in equity an assignment of part of

¹ Skinner v. Somes, 14 Mass. 107.

² Crucker v. Whitney, 10 Mass. 316; Jessel v. Williamsburg Ins. Co., 3 Hill, 88; Compton v. Jones, 4 Cow. 13.

³ Smith v. Brittain, 3 Ired. Eq. 347; 42 Am. Dec. 175; Tibbits v. Gerresh, 25 N. H. 41; 57 Am. Dec. 307.

⁴ Tingle v. Fisher, 20 W. Va. 487; Watson v. Bagely, 12 Pa. St. 164; 51 Am. Dec. 596.

⁵ Boner v. Hadden Co., 30 N. J. (Eq.) 17; Shannon v. Hoboken, 37 N. J. (Eq.) 123; Brokaw v. Brokaw, 41 N. J. (Eq.) 215; Bank v. Bogy, 44 Mo. 18; 100 Am. Dec. Rollenson v. Hope, 18 Tex. 446.

⁶ Walker v. Brooks, 125 Mass. 241; Hayward v. Andrews, 106 U. S. 673; New York, etc., Co. v. Memphis Water

Co., 107 U. S. 205; Carter v. Insurance Co. 1 Johns. Ch. 463; Adair v. Winchester, 7 G. & J. 114; Mosely v. Bush, 4 Rand. 393; Smiley v. Bell, Mart. & Yerg. 378; Bank v. Mumford, 2 Barb. Ch. 596.

⁷ Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Palmer v. Merrill, 6 Oush. 257; 52 Am. Dec. 782; Miller v. Bledsoe, 1 Ill. 530; 32 Am. Dec. 37; Beardslee v. Morgner, 73 Mo. 22; St. Louis Bk. v. Noonan, 88 Mo. 373; Knowlton v. Cooley, 103 Mass. 234; Philadelphia's Appeal, 86 Pa. St. 179; Carter v. Nichols, 58 Vt. 513. "The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one

a demand was good, even without the consent of the debtor.¹

(b) *Things in Futuro*. So while at law an assignment to be valid must be of a thing which at the time has an actual potential existence,² courts of equity will support assignments of things which have no present actual existence, but rest in possibility only,³ as for example an interest in the estate of a living ancestor,⁴ or an expected legacy,⁵ or a right to insurance money under a policy before any loss has occurred,⁶ or in rent yet to become due,⁷ or wages or compensation to be earned under an existing contract.⁸

creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and subdivided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear." *Exchange Bk. v. McLean*, 73 Me. 498; 40 Am. Rep. 388.

¹ *Grain v. Aldrich*, *supra*; *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435; *James v. City of Newton*, 142 Mass. 368; 56 Am. Rep. 692; *Trist v. Child*, 21 Wall. 447; *Risley v. Bank*, 83 N. Y. 329; 38 Am. Rep. 421; *Gallinger v. Pomeroy*, 3 G. Greene, 175; 54 Am. Dec. 496; *First Nat. Bk. v. Kimberland*, 16 W. Va. 590; *Foryce v. Nelson*, 91 Ind. 447. "In a court of equity the objection to a partial assignment of a demand which are formidable in a court of law, disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risk as to its proper distribution." *Exchange Bk. v. McLean*, *supra*.

² *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85; *Moody v. Wright*, 13 Met. 17; 46 Am. Dec. 706; *Mitchell v. Winslow*, 2 Story, 630; *Thalhimer v. Brinckerhoff*, 3 Cow. 623; 15 Am. Dec. 309; *Skipper v. Stokes*, 43 Ala. 255; 94 Am. Dec. 646; *Hassie v. Congregation*, 35 Cal. 398.

³ *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435; *Payne v. Mayor*, 4 Ala. 383; 37 Am. Dec. 744; *Brackett v. Blake*, 7 Met. 335; 41 Am. Dec. 442; *Pierce v. Robinson*, 18 Cal. 123; *Bibend v. Liverpool, etc., Ins. Co.*, 30 Cal. 86; *Hassie v. Congregation*, 35 Cal. 398; *Hall v. Buffalo*, 2 Abb. App. 307; *Power v. Alger*, 18 Abb. Pr. 475; *Ely v. Cook*, 9 Abb. Pr. 376; 28 N. Y. 265; *Stover v. Eycleshimer*, 4 Abb. App. 309; *Billings v. O'Brien*, 14 Abb. Pr. (N. S.), 246; *Seymour v. R. R. Co.*, 25 Barb. 284; *Wood v. Lester*, 39 Barb. 145; *Ruple v. Bindley*, 91 Pa. St. 299; *East Lewisburg, etc., Co. v. Marsh*, 91 Pa. St. 99; *Ellett v. Butt*, 1 Wood, 214; *Dunham v. R. R. Co.*, 1 Wall. 268; *Pennock v. Coc*, 23 How. 130; *First Nat. Bank v. Kimberlands*, 16 W. Va. 592; *Greene v. Bartholomew*, 34 Ind. 235.

⁴ *McDonald v. McDonald*, 5 Jones (Eq.), 21; 75 Am. Dec. 433; *Fitzgerald v. Vestal*, 4 Sneed, 258; *Stover v. Eycleshimer*, 46 Barb. 88; 4 Abb. App. Dec. 309.

⁵ *Bacon v. Bonham*, 33 N. J. (Eq.) 614.

⁶ *Bibhend v. Ins. Co.*, 34 Cal. 86; *Bergson v. Ins. Co.* 38 Cal. 541.

⁷ *Demarest v. Willard*, 8 Oom. 206.

⁸ *Garland v. Harrington*, 51 N. H. 407; *Augur v. New York Belting Co.*, 39 Conn. 536; *Hawley v. Bristol*, 39 Conn. 26; *Mulhall v. Quinn*, 1 Gray, 106; 61 Am. Dec. 414; *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435; *Hall v. Buffalo*, 2 Abb. App. 307; *Devlin v. Mayor*, 50 How. Fr. 1; *Billings v. O'Brien*, 14 Abb. Pr. (N. S.), 246; *Greene v. Bartholomew*, 34 Ind. 235; *Emery v. Lawrence*, 8 Oush. 154; *Weed*

§ 355. **What May Not be Assigned.** — A contract for personal service involving a personal relation or confidence between the parties cannot be assigned.¹ A contract between an author and a publisher for the publication of a work was held to be incapable of assignment by the publisher to another, on account of the personal trust reposed by the author in the publisher.²

Nor will equity enforce an assignment tainted with fraud or illegality,³ nor an assignment against public policy, as an assignment by a public officer of the future salary or fees of his office;⁴ nor a mere voluntary assignment without consideration.⁵

§ 356. **Notice of Assignment Necessary.** — Though the assignment is effectual as between assignor and assignee from the moment it is made, it does not bind the person liable until he has received notice of it. The person liable has a right to know to whom his liability is due,

v. Jewett, 2 Met. 608; 37 Am. Dec. 115; *Boylan v. Leonard*, 3 Allen, 408; *Payne v. Mayor*, 4 Ala. 338; 37 Am. Dec. 744; *Twiss v. Cheever*, 2 Allen, 41; *Wallace v. Heywood Chair Co.*, 16 Gray, 208; *Taylor v. Lynch*, 5 Gray, 49; *Thayer v. Kelly*, 28 Vt. 19; 65 Am. Dec. 220. But the assignment is not good in equity when there is no contract at the time it is made. *Mulhall v. Quinn*, 1 Gray, 108; 61 Am. Dec. 414; *Hazell v. Tipton Bank*, 95 Mo. 60; 6 Am. St. Rep. 22; *Kane v. Clough*, 36 Mich. 436; 24 Am. Rep. 509; *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646; *Jermyn v. Moffitt*, 75 Pa. St. 399. The distinction between the cases in which the wages are not earned under a contract existing at the time of the assignment, and those in which they are, is said to be, that "in the former the future earnings are a mere possibility coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent, and liable to be defeated, is a vested right." *Low v. Pew*, 108 Mass. 247, 350; 11 Am. Rep. 357.

¹ *Hayes v. Willio*, 4 Daly, 259; *Davenport v. Gentry*, 9 B. Mon. 427; *Chapin v. Longworth*, 31 Ohio St. 421; *Lansden v. McCarthy*, 45 Mo. 106; *Palo Pinto Co. v. Gano*, 60 Tex. 247; *Griswold v. Carthage & R. Co.*, 18 Mo. App. 52; *Bethlehem v. Annis*, 40 N. H. 74; *Burger v. Rice*, 3 Ind. 125. A contract whereby the owner of land gives a lawyer the option of buying it at a certain price, in consideration of the latter taking all legal steps to perfect the title, is an executory contract for personal services requiring skill and is not assignable so as to be enforceable by an assignee of the lawyer. *Sloan v. Williams*, 27 N. E. Rep. 531 (Ill.).

² *Gibson v. Carruthers*, 8 Mees. & W. 343; *Stephens v. Benning*, 1 Kay & J. 168.

³ *Fletcher v. Ferrel*, 9 Dana, 372; 35 Am. Dec. 143.

⁴ *Biles v. Lawrence*, 58 N. T. 442; 17 Am. Rep. 273; *Beal v. McArthur*, 8 Mo. App. 302; and see *ante*, § 314; *Illegal Contracts*.

⁵ *Leake on Contr.* 1170.

and if he receives no notice that it is due to another than the party with whom he originally contracted, he is protected in any payment he may make to his original creditor.¹ The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no "legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee.*"²

And the rule that the assignment of a chose in action is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor, applies not only as regards the debtor, but likewise as to third persons. And, therefore, as between successive purchasers or assignees of a chose in action, he is entitled to preference who first gives notice to the debtor, although his assignment be subsequent to that of the other.³

¹ *Judson v. Coreoran*, 17 How. 612; *Winberry v. Koonce*, 88 N. O. 351; *Van Keuren v. Corkins*, 66 N. Y. 77; *Porter v. Dunlap*, 17 Ohio St. 591; *Richards v. Griggs*, 16 Mo. 416; 57 Am. Dec. 240; *Van Buskirk v. Ins. Co.*, 14 Conn. 141; 36 Am. Dec. 473; *Muir v. Schenck*, 8 Hill, 228; 38 Am. Dec. 633; *Smith v. Ewer*, 22 Pa. St. 116; 60 Am. Dec. 73; *Gaullagher v. Caldwell*, 22 Pa. St. 300; 60 Am. Dec. 85; *Merchants' Bank v. Hewitt*, 3 Iowa, 93; 66 Am. Dec. 49; *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 541; *Hogan v. Black*, 66 Cal. 41; *Hobson v. Stevenson*, 1 Tenn. Ch. 203; *Stebbins v. Bruce*, 80 Va. 389.

² *Stocks v. Dobson*, 4 D. M. & G. 15.

³ *Judson v. Coreoran*, 17 How. 615; *Spain v. Hamilton*, 1 Wall, 604; *Re Gillespie*, 15 Fed. Rep. 734; *Morrison v. Lynch*, 36 La. Ann. 611; *Van Buskirk v. Ins. Co.*, 14 Conn. 141; 36 Am. Dec. 473; *Flickey v. Lovey*, 4 Baxt. 173; *Clodfelter v. Cox*, 1 Sneed, 330; 60 Am. Dec. 157; *Ward v. Morrison*, 25 Vt. 600; *Barrow v. Porter*, 44 Vt. 587; *Bishop v. Holcomb*, 10 Conn. 444; *Murdock v. Finney*, 21 Mo. 138; *White v. Prentiss*, 3 T. B. Mon. 510. This is likewise the rule of the English courts. *Stocks v. Dobson*, 4 D. M. & G. 15; *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 30; *Foster v. Blackstone*, 1 Mylne & K. 297; *Foster v. Cockrell*, 3 Cl. & F. 456. In some States a

§ 357. **Form of Notice.** — The notice of the assignment need not be given in writing or in any formal manner; it is enough that the debtor has such knowledge of facts and circumstances as should be sufficient to put him on inquiry as to who is the real creditor.¹

§ 358. **Assignee takes Subject to Equities.** — The meaning of the rule that an assignee of a chose in action takes it subject to equities is that if a person takes an assignment of a chose in action, he must take his chance as to the exact position in which the party giving it stands, for the assignor can give no better right than he himself had.² Thus, suppose a debt is due from B to A but there is also a debt due from A to B which B might set off in an action by A, or B has paid a portion of the debt to A. If under these circumstances A assigns the debt to C without telling him of the set-off or of the part payment, B will be

contrary doctrine obtains and it is held that equitable assignments have priority not according to priority of notice but according to priority of time, and that as to all persons save the debtor, the assignment of a chose in action is complete in itself, and vests a perfect title in the assignee, as against third persons, without notice of the assignment to the debtor and that the purchaser can take no rights which his assignor did not possess. *Muir v. Schenck*, 3 Hill, 228; 38 Am. Dec. 633; *Robinson v. Weeks*, 6 How. Pr. 167; *Bush v. Lathrop*, 23 N. Y. 549; *Greentree v. Rosenstock*, 61 N. Y. 598; *Freund v. Importers', etc., Bank*, 76 N. Y. 356; *Moore v. Metropolitan Bk.*, 55 N. Y. 41; *Thayer v. Daniels*, 113 Mass. 129; *Putnam v. Storey*, 133 Mass. 205; *Summers v. Huston*, 48 Ind. 230; *White v. Wiley*, 14 Ind. 496; *Tingle v. Foster*, 20 W. Va. 507; *Kamena v. Huelbig*, 23 N. J. (Eq.) 78.

¹ *Anderson v. Van Alen*, 12 Johns. 343; *Barron v. Porter*, 44 Vt. 587; *Guthrie v. Bashline*, 25 Pa. St. 80; *Kellogg v. Krauser*, 145; 14 S. & R. 137; 16 Am. Dec. 480; *U. S. v. Sturges*, 1 Paine, 525; *U. S. v. Clark*, 1 Paine, 629.

² *Robeson v. Roberts*, 20 Ind. 155; 83 Am. Dec. 308; *Ayers v. Campbell*, 9 Ia. 213; 74 Am. Dec. 346; *Warner v. Whitaker*, 6 Mich. 133; 67 Am. Dec. 607; *York v. McNutt*, 16 Tex. 13; 67 Am. Dec. 607; *Natchez v. Minor*, 9 S. & M. 544; 48 Am. Dec. 727; *Bush v. Lathrop*, 23 N. Y. 535; *Walker v. Johnson*, 13 Ark. 522; *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632; *Blydenberg v. Thayer*, 1 Abb. App. 156; *Martin v. Richardson*, 68 N. C. 225; *Colquitt v. Bonner*, 2 Ga. 155; *Scott v. Shreve*, 12 Wheat. 605; *State Mut. Ins. Co. v. Roberts*, 31 Pa. St. 438; *Faull v. Tinsman*, 30 Pa. St. 108; *Ludwick v. Crull*, 2 Yeates, 464; 1 Am. Dec. 362; *Buckner v. Smith*, 1 Wash. (Va.) 296; 1 Am. Dec. 463; *Smith v. Tunno*, 1 McCord Ch. 443; 16 Am. Dec. 617; *Moore v. Holcombe*, 3 Leigh, 587; 24 Am. Dec. 633; *Cary v. Bancroft*, 14 Pick. 315; 25 Am. Dec. 338; *Jones v. Hardesty*, 10 Gill & J. 404; 32 Am. Dec. 180; *Foot v. Ketchum*, 15 Vt. 258; 40 Am. Dec. 678; *Hill v. McPherson*, 15 Mo. 204; 55 Am. Dec. 142; *Shotwell v. Webb*, 22 Wis. 375; *Wilson v. Bowden*, 26 Ark. 151; *Kleeman v. Frisbie*, 63 Ill. 482.

entitled to set them up as against C.¹ Or suppose B has contracted to pay A a certain sum of money but the contract is voidable on the ground of fraud or misrepresentation, or there is any other ground for setting it aside or rectifying it as against the creditor A. A assigns the contract to C who does not know the circumstances that render it voidable. Here B may avoid the contract as against C.²

As to whether the assignee takes the chose in action subject to what are called "latent equities," i. e. the equities of a prior assignor or a third person, is a question upon which the authorities are not agreed.³

§ 359. "Equities" Excluded by Contract or Conduct. — It has been held to be perfectly legal for two parties to a contract to stipulate that if either assign his rights under it, such an assignment shall be "free from equities;" that is to say, that the assignee shall not be liable to be met by such defenses as would have been valid against his assignor.⁴ But it has been questioned, whether such a stipulation would protect the assignee against the effects of fraud, or any vital defect in the formation of the original contract.⁵

And the debtor may by his conduct estop himself from setting up any right or equities against the assignee;⁶ as, for example, where the debtor induces the assignee to take the instrument by declaring that he has no defense to it, he cannot afterwards set up any defense.⁷ So a bona fide pur-

¹ Hooper v. Brundage, 22 Me. 460; Hall v. Hickman, 2 Del. Ch. 318; Hunt v. Shackleford, 55 Mass. 94; Bank v. Bynum, 84 N. C. 24; Lanbow v. Little, 3 N. H. 587; Metzgar v. Metzgar, 1 Rawle, 227; Wood v. Mayor, 73 N. Y. 556; McKenna v. Kirkwood, 50 Mich. 544.

² Graham v. Johnston, L. R. 8 (Eq.) 36; Holbrook v. Bart, 22 Pick. 546; Parker v. Clarke, 30 Beav. 54; Woodson v. Barrett, 2 Hen. & M. 80; 3 Am. Dec. 612; Williams v. Judy, 3 Gilm. 282; 44 Am. Dec. 699.

³ See Anson Contr. 225, Prof. Knowlton's notes, citing Bush v. Lathrop, 22 N. Y. 535; Bloomer v. Henderson, 8 Mich. 395; Sumner v. Waugh, 56 Ill. 581; 2 Pomeroy's Eq. Juris., §§ 708-715.

⁴ Ex parte Asiatic Bank, L. R. 2 Ch. 391

⁵ Anson Contr. 224.

⁶ Wordson v. Barrett, 2 H. & M. 80; 3 Am. Dec. 612.

⁷ Hardin v. Helton, 50 Ind. 322; Weaver v. Lynch, 25 Pa. St. 449; 64 Am. Dec. 713; Eldred v. Hazlett, 23 Pa. St. 316; Scott v. Sadler, 52 Pa. St. 214.

chaser of a chose in action not negotiable, from one to whom the owner has assigned the apparent absolute ownership, who purchases upon the faith of such ownership, obtains a valid title as against such owner, although the assignee had not such title.¹

§ 360. **Debtor's Assent Immaterial.** — The assignment binds the debtor without any assent on his part and even when he expressly dissents.² Thus, where the defendant received express notice of the assignment of a debt accruing from him to the assignor, but refused to be bound by the assignment and paid his debt to the assignor, he was nevertheless held liable to the assignee for the amount assigned.³

§ 361. **What Passes on Assignment.** — An assignment of a debt carries with it all collateral securities which the creditor may hold for its enforcement,⁴ and all the remedies which the assignor had.⁵ Thus, the assignment of a bond or a promissory note secured by a mortgage or deed of trust carries with it these securities.⁶ And the assignment of the principal carries with it the interest on the debt.⁷

§ 362. **Liability of Assignor.** — The assignor of a chose in action impliedly warrants that he has a good title to it,⁸

¹ *Moore v. Met. Nat. Bk.*, 55 N. Y. 41; 14 Am. Rep. 173; *Ooombs v. Chandler*, 33 Ohio St. 173; *Jarvis v. Rogers*, 13 Mass. 105; *McNeill v. Bank*, 46 N. Y. 325; *Cowdrey v. Vandenburg*, 101 U. S. 572; *Cochran v. Stewart*, 21 Minn. 435; *State v. Hastings*, 15 Wis. 75; *Cherry v. Frost*, 7 Lea, 1; *Woods' Appeal*, 92 Pa. St. 379; *Burton's Appeal*, 93 Pa. St. 214; *Prall v. Tilt*, 27 N. J. (Eq.) 479; *Grocers' Bank v. Neet*, 29 N. J. (Eq.) 440; *International Bk. v. German Bk.*, 71 Mo. 183; *Walker v. Railway Co.*, 47 Mich. 339; *Otis v. Gardner*, 105 Ill. 436; *Strange v. E. Co.*, 53 Tex. 162.

² *Brill v. Tuttle*, 81 N. Y. 454; 37 Am. Rep. 515; *Hall v. Ins. Co.*, 111 Mass. 53; 15 Am. Rep. 1.

³ *Brice v. Banister*, 3 Q. B. Div. 569.

⁴ *Lindsey v. Bates*, 42 Miss. 397; *Walker v. Tate*, 4 B. Mon. 529; *Hurt v. Willson*, 38 Cal. 263.

⁵ *Morris v. McCulloch*, 83 Pa. St. 34; *Marshall v. Oray*, 3 Bibb, 291; *Carlton v. Buckner*, 23 Ark. 66; *Strother v. Hamburg*, 11 Ia. 59.

⁶ *Miller v. Hoyle*, 6 Ired. (Eq.) 269; *Perot v. Levasseur*, 21 La. Ann. 529; *Brown v. Blydenburgh*, 7 N. Y. 141; 57 Am. Dec. 507; *Cathcart's Appeal*, 13 Pa. St. 416; *Bolen v. Crosby*, 49 N. Y. 183.

⁷ *Mabry v. Memphis*, 12 Heisk. 537.

⁸ *Ledwich v. McKim*, 53 N. Y. 307; *Stroh v. Hess*, 1 Watts & S. 153; *Giffert v. West*, 33 Wis. 617.

and the assignor of a bond impliedly covenants that he has a right to transfer what his assignment purports to pass.¹ But there is no implied warranty on his part that the obligee will pay it, or that he will repay the consideration in case the obligee fails.²

§ 363. *Assignment by Statute.* — Modern statutes have greatly extended the common law rules as to the assignability of choses in action, either by express words, or indirectly in the code States, by authorizing the assignee to bring the action in his own name or by requiring all actions to be brought in the name of the real party in interest, thus adopting the doctrines of equity on the subject.³ The test of whether a cause of action is assignable is, would it survive to the executors or administrators of the assignor in case of his death? If it would, it is assignable. Therefore, all choses in action arising upon contract which were assignable in equity;⁴ all estates and interests in either chattels, lands or tenements;⁵ or claims arising out of them,⁶ are assignable under the statutes of the different States.⁷

¹ *Emmerson v. Claywell*, 14 B. Mon. 18; 58 Am. Dec. 645; *Winstell v. Hehl*, 6 Bush. 62.

² *Garretts v. Van Ness*, 2 N. J. (L.) 20; 2 Am. Dec. 333; *Looney v. Pinkston*, 1 Over. 384; *Whiteman v. Childress*, 6 Humph. 303; *Lawrence v. Dangherty*, 5 Yerg. 453; *Jackson v. Crawford*, 13 Serg. & R. 165; *Robinson v. White*, 4 Litt. 238; *Walker v. Scott*, 2 Nott & McC. 238. *Contra* in Virginia, *Mackie v. Davis*, 2 Wash. 119; 1 Am. Dec. 482; *Smith v. Triplett*, 4 Leigh, 539.

³ See the provisions of the statutes in 1 Stim. Am. St. L. 4031.

⁴ *Jordan v. Thornton*, 7 Ark. 234; 44 Am. Dec. 546; *Doering v. Kenamore*, 86 Mo. 588; *Snyder v. R. R. Co.*, 86 Mo. 613; *Davis v. R. R. Co.*, 25 Fed. Rep. 736; *Strong v. Clem*, 12 Ind. 39; 74 Am. Dec. 200; *McMahon v. Allen*, 12 Abb. Pr. 278; 84 Barb. 63.

⁵ *Ensign v. Kellogg*, 4 Pick. 1; *Bigelow v. Wilson*, 1 Pick. 485; *Cody v. Quar-*

termann, 12 Ga. 336; *Willard v. Tillman*, 2 Hill, 274; *Gardner v. Byard*, 23 Ga. 269; 68 Am. Dec. 527; *Scott v. Berry*, 46 Ga. 395; *McBee v. Loftis*, 1 Strob. Eq. 90; *Van Rensselaer v. Hayes*, 19 N. Y. 63; 75 Am. Dec. 278; *Lombard v. Ruggles*, 9 Me. 62.

⁶ See *Lawson Rights, Rem. & Pr.*, § 2650, *et seq.*, where the cases are collected.

⁷ Certain interests in property are required by statute to be assigned in certain forms. The assignment of an interest in a copyrighted book must be in writing; it must be recorded in the office of the librarian of Congress within sixty days after its execution; otherwise it is void as against subsequent purchasers or mortgagees without notice and for a valuable consideration. *Rev. Stat.*, § 4955; *Gould v. Banks*, 8 Wend. 562; 24 Am. Dec. 91. So, any assignment, grant, or conveyance of a patent is void as against any subsequent purchaser or

On the other hand, a claim for a personal injury which does not survive to the personal representatives of the party injured or wronged is not assignable;¹ as, for example, actions for deceit, for breach of promise of marriage, for negligent injury to the person, for slander or for malicious prosecution.²

§ 364. **Assignability Distinguished from Negotiability.** — We have seen that the assignment of a contract binds the party chargeable to the assignee, only when notice is given to him, and subject always to the rule that the assignor cannot give a better title than he possesses himself. But there is a class of promises the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defenses which would have been good against the assignor of the promise. This is called Negotiability.

The negotiable instruments known to our law are bills of exchange, checks and promissory notes, bills of lading, certificates of deposit, certain kinds of bonds and coupons, warehouse receipts and bank bills.³ The peculiar incidents

mortgagee for a valuable consideration, without notice, unless it is in writing and recorded in the patent-office within three months from the date thereof. *R. S.*, § 4898; *Hartshorn v. Day*, 19 *How.* 211; *Ennson v. Dodge*, 18 *Wall.* 414; *Perry v. Corning*, 7 *Blatchf.* 195; *Celluloid Mfg. Co. v. Goodyear Dental Vul. Co.*, 13 *Blatchf.* 575; *Pitts v. Jameson*, 15 *Barb.* 310; *McKay v. Wooster*, 2 *Saw.* 373; *Turnbull v. Weir Plow Co.*, 6 *Biss.* 225. And shares of stock in corporations are required either by statute or by the by-laws of the corporation to be assigned in a certain form.

¹ *Zabriskie v. Smith*, 13 *N. Y.* 322; 64 *Am. Dec.* 531; *Devlin v. Mayor*, 63 *N. Y.* 15; *Lattimore v. Simmons*, 13 *S. & E.* 183; *Elice v. Stone*, 1 *Allen*, 563; *Linton v. Hurley*, 104 *Mass.* 353; *Norton v. Tuttle*, 60 *Ill.* 120; *Grant v. Ludlow*, 8 *Ohio St.* 1;

McGlinchey v. Hall, 58 *Me.* 152; *Comegys v. Vasse*, 1 *Pet.* 193; *Brooks v. Handford*, 15 *Abb. Pr.* 342; *Hodgman v. R. R. Co.*, 7 *How. Pr.*, 492; *Nash v. Hamilton*, 3 *Abb. Pr.*, 37; *Pulver v. Harris*, 62 *Barb.* 503; 53 *N. Y.* 75; *Meech v. Stoner*, 19 *N. Y.* 28; *Brush v. Sweet*, 38 *Mich.* 574; *Dayton v. Fargo*, 45 *Mich.* 153; *Stewart v. Houston*, etc., *R. Co.*, 63 *Tex.* 246; *Miller v. Newall*, 20 *S. C.* 127.

² *Dayton v. Fargo*, 45 *Mich.* 153; *Zabriskie v. Smith*, 13 *N. Y.* 322; 64 *Am. Dec.* 531; *Ward v. Blackwood*, 41 *Ark.* 235; *Huff v. Watkins*, 20 *S. C.* 477; *Sawyer v. Concord R. R. Co.*, 58 *N. H.* 517; *Jenkins v. French*, 58 *N. H.* 532; *Clark v. Carroll*, 59 *Md.* 180; *Hannah v. Richmond*, etc., *R. R.*, 87 *N. C.* 351; *Renfro v. Prior*, 25 *Mo. App.* 402.

³ Bills of exchange, checks, bank bills, certificates of deposit, and certain

and privileges annexed to this class of promises are, that the assignee can sue all parties to the instrument in his own name; that the consideration for the transfer is *prima facie* presumed; that the assignor can under certain conditions give a good title, although he has none himself; and that the assignee can further negotiate the bill with the like privileges and incidents.¹ But any further discussion of negotiability belongs not here but to the special treatises on Negotiable Instruments.

(b) *Assignment by Operation of Law.*

§ 365. *Assignment by Marriage.* — At common law one of the immediate effects of marriage was that the husband at once became bound to pay all outstanding debts of his wife, of whatever amount, as a sort of a recompense for taking her property.² But by statute in several of the States this liability is either abolished altogether, or the husband's property except such as he acquires from the wife is not liable for the wife's pre-nuptial debts.³

§ 366. *Assignment by Death.* — Death passes to the executors or administrators of the deceased all his personal estate, all rights of action which would affect the personal estate, and all liabilities which are chargeable upon it. Thus, covenants which are attached to leasehold estate

classes of bonds were negotiable at common law by the law merchant. Promissory notes are negotiable by statute in all the States. Bills of lading and warehouse receipts are negotiable in many of the States by statute.

¹ Lawson Rights, Rem. & Pr., § 1555.

² Lamb v. Belden, 16 Ark. 539; Cureton v. Moore, 2 Jones (Eq.), 204; Roach v. Quick, 9 Wend. 238; Butler v. Breck, 7 Met. 164; 39 Am. Dec. 768; Prescott v. Fisher, 22 Ill. 390; Alexander v. Morgan, 31 Ohio St. 546; Gruen v. Bamberger, 11 Mo. App. 261; Harrison v. Trader, 27 Ark. 288; Clawson v. Hutchinson, 11 S.

C. 323; Cole v. Seeley, 25 Vt. 290; 60 Am. Dec. 258.

³ Missouri Laws 1881, p. 161; Laws of Kentucky and New York; Roundtree v. Thomas, 32 Tex. 296; Shore v. Taylor, 46 Ind. 345; Travis v. Willis, 55 Miss. 557; Wood v. Orford, 59 Cal. 413; Cannon v. Grantham, 45 Miss. 88; Madden v. Gilmer, 40 Ala. 637; Bryan v. Doolittle, 38 Ga. 255; Smiley v. Smiley, 18 Ohio St. 543; Bailey v. Pearson, 29 N. H. 77; Reunecker v. Scott, 4 G. Greene, 185; Callahan v. Patterson, 4 Tex. 61; 51 Am. Dec. 712; Cuny v. Shrader, 19 Ala. 851; Connor v. Berry, 46 Ill. 370; 95 Am. Dec. 417.

pass, as to benefit and liability, with the personalty to the executor or administrator, while covenants affecting the freehold, as covenants for title in a conveyance of freehold property, pass to the heir or devisee of the realty.¹

But contracts which depend upon the personal services or skill of the deceased cannot be demanded of his representatives, nor can they insist upon offering such performance. Contracts of personal service expire with either of the parties to them. Thus, a contract of service is terminated by the death of the master or servant, and no claim to the services of the servant survives to the executor;² nor, on the other hand, has the servant any claim on the estate of the master. Thus, where a clerk was hired for three years at a stated salary to carry on a branch store, and before the end of the term the employer died, it was held that there could be no recovery against his estate, as the contract was terminated by his death.³

And a breach of contract which involves a purely personal loss does not pass by death to the representatives of either party,⁴ and hence even under statutes which provide that a personal representative may sue or be sued on any contract of or with his deceased, it is held that an action for breach of promise of marriage cannot be maintained either against or by the representatives of the promisor.⁵

§ 367. *Assignment by Bankruptcy.* — Bankruptcy operates to confer upon the assignees of the bankrupt, his rights and liabilities.

§ 368. *Interests in Lands.* — And where an interest in land is transferred rights and liabilities attaching to the enjoy-

¹ Anson Contr. 225; Lawson Rights, Rem. & Pr., § 234d.

² Wood Master & Servant, § 52.

³ Yerrington v. Greene, 7 R. I. 569; 84 Am. Dec 578.

⁴ Chamberlain v. Williamson, 2 M. & S. 408.

⁵ Grubb v. Sult, 22 Gratt. 207; Wade v. Kalbfleisch, 58 N. Y. 289; Hovey v. Page, 55 Me. 142; Smith v. Sherman, 4 Oush. 408; Chase v. Fitz, 132 Mass. 313; Lattimore v. Simmons, 13 S. & R. 163; Stebbins v. Palmer, 1 Pick. 71.

ment of the interest pass with it. Thus if A by purchase or lease acquire an interest in land of B, upon terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest to C will within certain limits operate as a transfer to C of those obligations. Such obligations are termed covenants and those which pass to the assignee are those which are said to "run with the land."¹

For a covenant to run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.² But this class of promises is a branch of the law of Real Property and will not be further discussed here.

¹ See Lawson *Rights, Rem. & Pr.*, § 2908.

² *Wiggins Ferry Co. v. R. R. Co.*, 94 Ill. 83.

PART III.

THE INTERPRETATION OF THE CONTRACT.

§ 369. INTRODUCTORY.

§ 369. **Introductory.**— We have considered the elements necessary to the Formation of the Contract, and its Operation as regards those who were parties to its formation and those who became interested in it by assignment. We now pass to the Interpretation of the Contract, *i. e.*, the meaning which is attached to it, and the liabilities thereunder, when it is presented to a court for enforcement. This subject is naturally divisible into two parts, and will be considered in the two succeeding chapters, *viz.*: 1st. The sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention — which we call *proof of the contract*, and, 2d, the rules which exist for construing that intention from expressions ascertained to have been used, — which we call *construction of the contract*.

CHAPTER IX.

THE PROOF OF THE CONTRACT.

SECTION 370. Proof of oral contracts.

371. Proof of contracts in writing.

372. Oral evidence to vary or contradict writing inadmissible.

I.

PROOF OF EXISTENCE OF DOCUMENT.

373. Contracts under seal.

374. Written contracts not under seal.

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PROOF OF FACT OF AGREEMENT.

375. Proof that there is no valid contract.

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(c) *Usages of Trade.*

383. To explain technical terms in written contracts.

384. To add unexpressed terms to written contracts.

385. Requisites to the validity of a usage of trade.

§ 370. **Proof of Oral Contracts.**—Where the agreement is made by word of mouth, and it is of such a character that it is not required to be proved by written evidence,—as contracts under the Statute of Frauds for example are—the only thing to prove is what the parties said, and this being proved it is not open to either of them to say that he

did not mean what he said. When the exact language of the parties is disputed it is for the jury to determine as matters of fact what they did say, and the court (the jury having found what they did say) decides whether what they have said amounts to a contract, and if so what is its effect.

§ 371. **Proof of Contracts in Writing.** — A contract under seal, as we have seen,¹ derives its validity from its form, and therefore when the execution of such an instrument is proved the contract is proved. But a written contract not under seal is only evidence of the agreement between the parties, and where the contract is not required by statute to be in writing, it is optional to the parties to express their agreement by word of mouth, by act or by writing, or partly in one way and partly in the other. Therefore it will often happen that the contract will have to be sought for in the words and acts as well as the writing of the contracting parties. But it must always be borne in mind that so far as they have reduced their agreement to writing they are not allowed to prove any oral language they may have used contradicting or altering the writing.

§ 372. **Oral Evidence to Vary or Contradict Writing Inadmissible.** — When parties reduce their agreement to writing the law presumes that they intend to embody therein those only of the oral negotiations and statements which have been made on one side or the other, which they have finally agreed upon as their contract, and hence it excludes and refuses to hear evidence of representations made or terms offered during its negotiation; and will not admit oral evidence to vary, alter or add to the written agreement.² Nevertheless oral evidence is necessarily ad-

¹ *Ante*; Deeds.

² *Knowlton v. Keenan*, 146 Mass. 86; 4

Am. St. Rep. 203; *Donley v. Bush*, 44 Tex.

1; *Richardson v. Comstock*, 21 Ark. 69;

mitted in some cases even when the agreement is or purports to be in writing. And these cases are three, viz.: I. To prove the existence of the document. II. To prove the fact of the agreement. III. To prove the terms of the agreement.

I.

PROOF OF EXISTENCE OF DOCUMENT.

§ 373. **Contracts Under Seal.** — A contract under seal is proved by evidence of the sealing and delivery. At common law when the deed was witnessed it was necessary to call one of the attesting witnesses to prove it. If the attesting witness was dead, or incapable of testifying, or out of the jurisdiction of the court, execution of the deed might be proved by proving the handwriting of such witness.¹ But it is now generally held that when the attesting witnesses cannot be produced, proof of the handwriting of the party is sufficient, unless the instrument was required by law to be attested by witnesses.²

§ 374. **Written Contracts not Under Seal.** — Where the contract is in writing not under seal — a simple contract — parol evidence is of course admissible to prove the signatures of the parties,³ or to prove the time when it was made, where

Koehring v. Muemminghoff, 61 Mo. 408; 31 Am. Rep. 403; Ruiz v. Norton, 4 Cal. 365; 60 Am. Dec. 618; Warren v. Crew, 23 Ia. 315; Irish v. Dean, 39 Wis. 562; Johnson v. Pollock, 58 Ill. 181; Fankboner v. Fankboner, 20 Ind. 62; Cocke v. Bailey, 42 Miss. 81; Hagey v. Hill, 75 Pa. St. 108; 15 Am. Rep. 533; Everrin v. Saunders, 1 Conn. 249; 13 Am. Dec. 520; Gavinsel v. Crump, 23 Wall. 308; Eveleth v. Wilson, 15 Me. 107; Bromley v. Elliot, 38 N. H., 287; 75 Am. Dec. 133; Bond v. Clark, 35 Vt. 577; Hill v. Peyton, 21 Gratt. 368; Young v. Frost, 5 Gill, 287; Rogers v. Colt, 21 N. J. (L.) 704; Blackley v. Munson, 13 Conn. 299.

¹ Dunbar v. Marden, 13 N. H. 311; Beattie v. Hillard, 55 N. H. 436; Richards v. Skiff, 8 Ohio St. 586; Valentine v. Piper, 22 Pick. 85; Davis v. Higgins, 91 N. O. 382; Elliott v. Dyke, 78 Ala. 150.

² Landers v. Bolton, 26 Cal. 394; Newsum v. Luster, 13 Ill. 183; Cox v. Davis, 17 Ala. 717; Woodman v. Segar, 25 Me. 90.

³ The handwriting of a person if he refuses to admit that the writing produced is his may be proved in any one of the following ways. I. By the evidence of any person who saw him write it. II. By the opinion of any person acquainted with his handwriting,

no date appears,¹ or to show that the party sued is the party who made the contract,² or to supplement the writing when the writing constitutes only a part of the contract; as, for example, if A writes to B: "I will give you \$250 for your horse; if you accept, send him to me by train;" to the conclusion of the contract it would be necessary to prove the despatch of the horse. And so if A puts the terms of an agreement into a written offer which B accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest orally with B, parol evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of B.³ So where a contract consists of several documents which need oral evidence to show their connection, such evidence may be given to connect them.⁴ Where a writing is lost or destroyed parol evidence of its contents is allowed to be given.

II.

PROOF OF FACT OF AGREEMENT.

§ 375. **Proof that there is no Valid Contract.** — It is always open to a party to prove that a writing which on its face appears to be a valid contract is as a matter of fact not so but lacks one of the necessary elements of a valid

that it is his. And a person is said to be "acquainted" with another's handwriting within this rule, 1st, when he has seen that person write; 2d, when he has received letters from him in answer to letters written to him by the witness or under his direction or authority; 3rd, when in the ordinary course of business writing purporting to be written by him has passed through his, the witness', hands; 4th, when holding at the time an official position, signatures or writings of the person have come before him; 5th, when he has seen a signature which the person has acknowledged to be his. III. By a com-

parison of the disputed writing with other writings of the party proved or admitted to be genuine. IV. By the opinions of experts in handwriting. See *Lawson Expert & Opinion Ev.* 277, 428.

¹ *Lawson Rights, Rem. & Pr.*, § 2311.

² *Id.*

³ *Anson Contr.* 241.

⁴ *Bergin v. Williams*, 138 Mass. 544; *Myers v. Munson*, 65 Ia. 423; *Blake v. Coleman*, 22 Wis. 376; *Beer v. Aultman-Taylor Co.*, 32 Minn. 90; *Colby v. Dearborn*, 59 N. H. 326. *Aliter* as we have seen under the statute of frauds, *ante*, § 77.

and binding contract. Such evidence is admitted not to alter the purport of the agreement, but to show that it was made under such conditions as to preclude the reality of consent, or for such a purpose as the court would not lend its aid to enforce. Therefore he may show by oral evidence that the instrument is void or of no binding effect because it was entered into under a mistake or was obtained by forgery or fraud, or through duress, or was made on an illegal consideration or in furtherance of an illegal object,¹ or by persons incapable of contracting, or was made without consideration.²

§ 376. **Proof that the Apparent Contract is not in Force.** — It is also admissible to show by oral evidence that the apparent contract is not as a matter of fact in force at all. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act.³ So, a simple contract may be shown to have been signed upon a condition which has not been performed.⁴

In *Pym v. Campbell*,⁵ the defendants agreed to purchase from the plaintiffs a portion of the benefits to be derived from a mechanical invention made by the plaintiffs. The purchase was to be made if one A approved of the invention, but before this approval had been given they signed a memorandum of agreement on the express understanding that they did so for convenience only and that the agreement was not to bind them until the approval of A had been intimated. A did not approve of the invention. The plaintiffs contended that the agreement was binding and that the verbal condition was an attempt to vary by parol the terms of a written contract. But the court held that the

¹ See *Wooden v. Shotwell*, 38 N. J. (L.) 465; *Buffendean v. Brooks*, 23 Cal. 641; *Allen v. Hawks*, 18 Pick. 79; *Totten v. United States*, 92 U. S. 105; *Ferguson v. Sutphen*, 8 Ill. 547; *Sackford v. Newington*, 46 N. H. 415; *Pratt v. Langdon*, 97 Mass. 37; and see *ante*, §§ 91, 111, 205, 278.

² *Lawson Rights, Rem. & Pr.*, § 2312.

³ See *ante*, § 68; *Deeds*.

⁴ *Pierce v. Woodward*, 6 Pick. 206; *Shugart v. Moore*, 78 Pa. St. 469; *Cuthrell v. Cuthrell*, 101 Ind. 575.

⁵ 6 E. & B. 370.

evidence was admissible. "The distinction," said the court, "in point of law is this, that evidence to vary the terms of an agreement in writing is not admissible but evidence to show that there is not an agreement at all is admissible."

III.

PROOF OF TERMS OF AGREEMENT.

§ 377. **How Far Oral Evidence Admissible.** — The rule being so well established and so extensive in its operation that a written contract cannot be varied or added to by verbal evidence of the intention of the parties, the cases in which such evidence will be admitted to affect the terms of a contract as they appear in writing are necessarily few and are restricted to evidence (a) of supplementary or collateral agreements (b) of explanation of terms and (c) of usages of trade.

(a) *Supplementary Agreements.*

§ 378. **Evidence of Supplementary or Collateral Agreement.** — Where parties to a contract have not put all its terms into writing, evidence of its supplementary terms is admissible, not to vary but to complete the written contract.¹

In *Malpas v. London, etc., R. Co.*,² a cattle dealer wanting to send some cattle from Guildford to Islington, they told him at Guildford station that the beasts would be duly forwarded to King's Cross; but they inveigled him into signing a consignment note by which the cattle were directed to be taken to the Nine Elms station, which was not so far as the cattle dealer expected them to go. At this intermediate station they remained and suffered injury. The

¹ *Cook v. Murphy*, 70 Ill. 96; *Lyon v. Lemon*, 106 Ind. 567; *Wood v. Gertner*, 55 Mich. 453; *Mobile, etc., Co. v. Jurey*,

111 U. S. 564; *Reynolds v. Hassam*, 56 Vt. 449; *Lash v. Farlin*, 78 Mo. 391.

² L. R. 1 C. P. 336.

company argued that the consignment note was conclusive evidence of the terms of the contract and therefore that they had never undertaken to carry further than the Nine Elms station. But for the cattle dealer it was successfully contended that the consignment note did not constitute a complete contract and that parol evidence could be given of the conversation that had taken place between the plaintiff and the company's servants before the consignment note was signed. In regard to the company's argument that the written contract was conclusive evidence that the cattle were to be carried to Nine Elms and no farther, Erle, C. J., said: "I think that it is not so, because it seems clear on the evidence that there may have been a contract to carry to Nine Elms and an additional contract to carry the cattle on from thence to King's Cross. The parol evidence therefore does not vary or contradict the written document, but only makes an addition to it."

(b) *Explanation of Terms.*

§ 379. *Identity of Parties.* — Oral evidence is admissible to explain the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name but on behalf of a principal whose name or whose existence he does not disclose.¹

§ 380. *Identity of Subject-matter.* — Oral evidence is admissible to identify the subject-matter of the contract. Thus, where the subject of property is described in the contract or conveyance by the locality, as being in a particular town or place; or by its character, quality, or use, as in a contract to sell "the mill property;" or by the ownership,

¹ Anson Contr. 345; Prof. Knowlton's notes, citing *Leach v. Dodson*, 64 Tex. 185; *Johnson v. Bennett*, 67 Iowa, 679; *Cleveland v. Burnham*, 64 Wis. 347; *Brewster v. Baxter*, 2 Wash. 135; *Sauer*

v. Brinker, 77 Mo. 239; *Bartlett v. Remington*, 59 N. H. 364; *Mobberley v. Mobberley*, 60 Md. 376; *Bartley v. Tarrant*, 20 S. C. 574; *Nutt v. Humphrey*, 32 Kan. 100.

as in a contract to sell "my house," or "Mr. O's house;" or by the occupation of a certain person,— in all such cases evidence is admissible to show what is the property answering to the description of place, character, ownership, or occupation, or what is reputed so to be.¹

§ 381. **Application of Phrases.** — Oral evidence is also admissible in explanation of words in the contract not describing the subject-matter of the contract, but the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract. Where a vessel is warranted "seaworthy," a house promised to be kept in "tenantable" repair, a thing undertaken to be done in a "reasonable" manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, and so to ascertain the intention of the parties.²

§ 382. **Latent Ambiguity.** — Oral evidence is admissible to explain a latent ambiguity in the instrument. A latent ambiguity is where you show that words apply to two different things or subject-matters, and then evidence is admissible to show which of them was the thing or subject-matter intended.³

In *Sargent v. Adams*⁴ the defendant entered into a written agreement to lease to the plaintiff the "Adams House"

¹ *Leake Contr.* 211; *Barrett v. Murphy*, 140 Mass. 133; *Thornell v. Brockton*, 141 Mass. 151; *Home v. Chatham*, 64 Tex. 36; *Robinson v. Douthit*, 64 Tex. 101; *Lyman v. Gedney*, 114 Ill. 388; *Baker v. McArthur*, 54 Mich. 189; *Thompson v. Stewart*, 60 Ia. 223.

² *Anson Contr.* 246.

³ *Waymack v. Hellman*, 26 Ark. 449; *Wood v. Augustine*, 61 Mo. 46; *Baldwin v. Winslow*, 2 Minn. 218; *Fenderson v. Owen*, 54 Me. 574; 92 Am. Dec. 551; *Stone v. Aldrich*, 43 N. H. 52; *Simpson v. Kimberlin*, 12 Kan. 579; *Jenkins v. Cooper*, 50

Ala. 419; *American Express Co. v. Schier*, 55 Ill. 140; *Lowry v. Adams*, 22 Vt. 160; *Conover v. Wardell*, 20 N. J. (Eq.) 266; *Davis v. Shaw*, 42 Md. 410; *Terrell v. Walker*, 69 N. C. 244; *Polndexter v. McCannon*, 1 Dev. (Eq.) 373; 18 Am. Dec. 591; *Armstrong v. Burrows*, 6 Watts, 266; *Insurance Co. v. Troop*, 22 Mich. 146; *Greene v. Day*, 34 Iowa, 328; *Sargent v. Adams*, 3 Gray, 72; 63 Am. Dec. 718; *Hineman v. Rosenbeck*, 39 N. Y. 96; *Verzan v. McGregor*, 23 Cal. 339.

⁴ 3 Gray, 72; 63 Am. Dec. 718.

in Boston for a term of ten years. The defendant had fitted up an old hostelry called the Lamb Tavern as a hotel and had christened it the "Adams House." The entrance to the hotel was on Washington street, and was numbered 371. The rest of the ground floor of the building was fitted up for stores which were numbered 1, 2, 3, 4 and 5, Adams House. When the time came for the defendant to present the plaintiff with the lease the latter discovered that it did not include all these stores, but only one of them. He therefore refused to accept it and brought an action to recover back a sum of money which he had advanced to the defendant under the agreement. But the Supreme Court allowed the defendant to prove by parol that the agreement originally was that the lease should include only the hotel proper and one of the stores. "The court are of opinion," said Chief Justice Shaw, "that this constituted a case of latent ambiguity as that is understood and explained in this department of the law. It falls under that class of cases where the very general description adopted in a contract will apply to two distinct subjects and so there is a latent ambiguity."

But what is called a *patent* ambiguity, i. e., an ambiguity appearing on the face of the instrument itself, cannot be explained by parol.¹ Thus, where a bill of exchange was drawn for "two hundred pounds" but the figures at the top were "245," evidence was not admitted to show that the bill was intended to be drawn for the larger amount.²

(c) *Usages of Trade.*

§ 383. To Explain Technical Terms in Written Contracts. — The customs of particular classes of men soon give to particular words different meanings from those which they may have among other classes, or in the community generally. Mercantile contracts are commonly framed in a

¹ *Aspden's Estate*, 2 Wall. Jr. 368.

² *Sanderson v. Piper*, 5 Bing. N. C. 425.

language peculiar to merchants, and hardly understood outside their world. Agreements which are entered into every day in the year between members of different trades and professions are expressed in technical and uncommon terms. The intentions of the parties, though perfectly well known to themselves, would be defeated were the language employed to be strictly construed according to its ordinary meaning in the world at large. Hence, while words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary and popular meaning, yet if, in reference to the subject-matter of the contract, particular words and expressions have by usage acquired a meaning different from their plain, ordinary and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense. And so words technical or ambiguous on their face, or foreign or peculiar to the sciences or the arts, or to particular trades, professions, occupations or localities, may be explained, where they are employed in written instruments, by parol evidence of usage.¹

The evidence is not incompetent because the words are in their ordinary meaning unambiguous, for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the parties in a different sense.² What words are more plain and unambiguous on their face than such words as "a thousand" "a week," "a day?" Yet, "a thousand" has been held to mean twelve hundred and seven hundred respectively; "a week," a week only during a portion of the year; "a day," only ten hours.

¹ *Smith v. Clayton*, 29 N. J. (L.) 357; *Fostere v. Robinson*, 6 Ohio St. 90; *Steamboat Albatross v. Wayne*, 16 Ohio St. 513; *Lowe v. Lehman*, 15 Ohio St. 179; *Brown Chemical Co. v. Atkinson*, 91 N. O. 389; *Everingham v. Lord*, 19 Ill. App. 585; *Potter v. Morland*, 3 Cush. 384; *Wilcox v. Wood*, 9 Wend. 346; *Swift Iron & Steel Works v. Drury*, 37 Ohio St. 242;

Hartwell v. Cannon, 10 N. J. (Eq.) 128; *Seymour v. Osborne*, 11 Wall. 516; *Moran v. Prather*, 23 Wall. 492; *Eaton v. Smith*, 20 Pick. 150; *Broadwell v. Broadwell*, 6 Ill. 599; *Williams v. Woods*, 16 Md. 320.

² *Lawson Usages & Customs*, § 151; *Myers v. Sari*, 30 L. J. Q. B. 9; *Brown v. Byrne*, 3 El. & Bl. 708.

In *Smith v. Wilson*,¹ Smith leased from Wilson a rabbit warren and covenanted that at the end of the term he would leave on the land at least ten thousand rabbits, Wilson to pay him £60 a thousand for all he left. When the lease was up two persons were appointed to count the rabbits and they reported the number at nineteen thousand two hundred. But when Wilson came to settle he wanted to pay for only sixteen thousand rabbits, on the ground that "thousand" in that part of the country when applied to rabbits meant twelve hundred or a hundred dozen. Smith thereupon brought an action for nineteen thousand two hundred rabbits at £60 a thousand. But the court allowed Wilson to show that the custom of the country was just as he had contended; and all the judges of the King's Bench agreed that this was correct law.

In *Soutier v. Kellerman*,² the plaintiff bought and paid for four thousand shingles of a dealer but after they were delivered in eight bundles he discovered that he had received only 2,500 shingles and brought suit for the difference. It was held that evidence was admissible that in the lumber trade shingles were not counted, but that two packs of shingles of a certain size were considered as a thousand shingles without reference to the actual number in each pack.

In *Grant v. Maddox*,³ by a written contract the plaintiff agreed to perform at the defendant's theater and the latter agreed to engage her for three years and to pay her a salary of £5, £6, and £7 "per week" in those years, respectively. In an action on the contract, the plaintiff contended that she was entitled to receive the salary stipulated for every week of the whole of three years, but the defendant tendered evidence, which was admitted, to show that according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more "years,"

¹ 3 B. & A. 728; Lawson Usages & Customs, 235.

² 18 Mo. 509.

³ 15 M. & W. 737.

actors were never paid during the time of vacation, but only during what was called the theatrical season.

In *Horton v. Locke*,¹ where by a building contract, the plaintiff agreed to make certain alterations and repairs upon the defendant's house, for which the latter agreed to pay twelve shillings "per day" for each man employed, it was held competent to show a usage among carpenters that ten hours constituted a "day's" work, and entitling them to charge one day and a quarter for each day during which the men worked twelve hours and a half. "Here," said Bronson, J., "the plaintiff was to be paid for his workmen at the rate of twelve shillings *per day*, but the parties have not told us by their contract what they meant by a day's work. It has not been pretended that it necessarily means the labor of twenty-four hours. How much, then, does it mean? Evidence of the usage or custom was let in to answer that question. And when we find a universal usage in this business to call ten hours' labor a day's work, we have arrived at the true meaning of the word 'day' as used in this contract."

§ 384. To Add Unexpressed Terms to Written Contracts. — But it has been long recognized by the courts that it is quite as necessary to allow usage to explain what was purposely left unsaid as what was clothed in technical language.² And the principle on which such usages are admitted rests on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."³

In *Cooper v. Kane*,⁴ the plaintiff was the owner of a city

¹ 5 Hill, 487.

² *Ex parte Conway*, 4 Ark. 302, 367; *Buckner v. Real Estate Bank*, 5 Ark. 536; *Worthington v. Curd*, 15 Ark. 491; *Jones v. Bradner*, 10 Barb. 193; *Lawrence v. Gallagher*, 10 Jones & Sp. 309; *Wilson v. Randall*, 67 N. Y. 338; *Dent v. North*

American Steamship Co., 49 N. Y. 390; *Robinson v. Fiske*, 25 Me. 401; and see the cases collected in *Lawson Usages and Customs*, Chap. IV.

³ *Hutton v. Warren*, 1 M. & W. 466.

⁴ 19 Wend. 386; 33 Am. Dec.

lot and by a contract in writing the defendant agreed to excavate the lot and make the necessary embankments within a limited time, for which he was to be paid by the plaintiff \$180 when the work was done. The defendant completed the job, and was paid the stipulated price. Whilst engaged in the work, the defendant placed a large quantity of sand, which was taken from the lot in order to make it conform to the required plan, on an adjoining lot, not belonging to the plaintiff, and when requested by the plaintiff to permit her to take it away, he refused such permission. For this detention the action was brought. There was no stipulation in the contract as to whom the sand taken from the lot in making the excavation should belong after it was taken from the lot. The defendant then offered to prove a custom, which had existed for a great number of years, and was well known and understood, that in the excavation of lots the material excavated belonged to the excavator, and not to the owner of the lot, unless there was an express reservation in the contract to the contrary. The judge rejected the testimony, and instructed the jury that on the evidence adduced the plaintiff was entitled to their verdict. On appeal this was held erroneous. "Nothing," said Nelson, L. J., "is said about the surplus earth: where it is to be laid, or what is to be done with it. Would it be a workman-like execution of the contract to pile it upon the adjacent bank? Or may the contractor dispose of it as he sees fit, and as most convenient and profitable to himself? It appears to me the solution of these questions may very well be referred to common usage in such cases, if any exist; and that if it should be proved, it is fair to conclude the particular parties contracted with reference to it. This usage may often have a very important influence upon the minds of the parties, as exemplified in this case, for the value of the materials which the plaintiff has recovered nearly equals the price of the job. If in fact the usage exists, and the contract was

made in reference to it, serious injustice must be the result of upholding the verdict."

And though as will be seen further on the usage or custom must not be of a character which is repugnant to, or inconsistent with the written contract, yet that it merely varies the written contract is not enough to make it inadmissible, for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less.¹

§ 385. *Requisites to the Validity of a Usage of Trade.*—But though a usage or custom of trade² is admissible for the purpose just stated, not all such usages can be proved, for to render a usage or custom of trade of binding force it must be shown to possess all the requisites of a valid usage or custom: And these requisites are:

(a) *It must be Established.*—It was required of a common law custom that it should be "ancient;" that is, it must have existed so long that the memory of man runneth not to the contrary. If a usage could be shown to have commenced, it was void as a custom. But while a usage of trade or business need not be "ancient," as that word is used in the books, it is nevertheless required that it shall be fully established as a usage of trade or business. And time is one ingredient, at least, necessary to accomplish this, for the rule that a usage must be "established" means simply that it must have existed a sufficient length of time to have become generally known.³

¹ Brown v. Byrne, 3 El. & Bl. 707.

² The word "custom" though properly applied only to the general and particular customs of common law the former of which established many of the fundamental rules of the common law; the latter of which consisted of local customs generally relating to land (see Lawson Usages & Customs, 17) is frequently used as synonymous with "usage" in describing a usage of trade. See Wallis v. Bailey, 49 N. Y. 464; Dicken-

son v. Gay, 7 Allen, 82; Jewell v. R. R. Co., 56 N. H. 84.

³ Wall v. East River Ins. Co., 3 Duer, 264; Cooper v. Berry, 21 Ga. 526; Smith v. Wright, 1 Calnes, 45; Trott v. Wood, 1 Gall. 444; Mears v. Waples, 3 Houst. 581; Clark v. Gifford, 7 La. 524; Hall v. Storrs, 7 Wis. 253; Newbold v. Wright, 4 Rawle, 195; Wilson v. Bauman, 80 Ill. 493; Adams v. Otterback, 15 How. 589; Buford v. Tucker, 44 Ala. 80; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.

(b) *It must be Certain and Uniform.*—A usage must be certain and uniform, both as to the person claiming under it and the thing claimed.¹ Thus where there was a usage set up among merchants in the city of Baltimore to deliver to purchasers merchandise sold for cash, without demanding the cash, and without the vendor waiving his right to cash payment, and the witness called to establish it said that he delivered the article without the cash only when he considered the purchaser good, the court said: "This is not a usage, which must be something fixed, certain, and universal. A usage which differs upon the action of each particular person is no usage. One man may think the purchaser good, when his next neighbor may think otherwise; and this is said to be a usage!"² In another case, a deed of composition provided that "borrowed money" should be paid in preference to certain other debts, and it was claimed that these words had by usage a peculiar meaning among the merchants of the place. One witness defined the phrase as "money loaned on call, for which no charge is made;" another said: "If a person asks me to take money on interest for fifteen or twenty days, it would be borrowed money;" a third said: "If money is loaned for twelve months, on interest, it is not a debt of honor, nor if loaned for an indefinite time;" and a fourth witness testified: "If a party lends me money for my accommodation, trusting to my honor, for an indefinite time, I consider it a debt of honor." The court held that the custom was inadmissible, as lacking the elements of certainty and uniformity, saying: "The testimony is inconsistent and contradictory. A standard so variable

¹ *Wallace v. Morgan*, 23 Ind. 399; *Union R. Co. v. Yeager*, 34 Ind. 1; *Oelrichs v. Ford*, 28 How. 47; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Munroe v. Spencer*, 24 Md. 520; *Adams v. Pittsburg Ins. Co.*, 76 Pa. St. 411; *Ill. Masons Soc. v. Baldwin*, 86 Ill. 479; *Isham v. Fox*, 7 Ohio St. 317; *Hinton v.*

Coleman, 45 Wis. 165; *Vos v. Robinson*, 9 Johns. 192; *Touro v. Cassin*, 1 Nott & M. 173; *Phillips v. Wheeler*, 10 Texas, 536; *Singleton v. Hillard*, 1 Strobb. 208; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206.

² *Foley v. Mason*, 6 Md. 87.

is incapable of application, and cannot control the well-understood meaning of words.”¹

(c) *It must be Continued.* — There must have been no interruption or temporary ceasing of the usage,² and it must be shown to have existed up to the time of the transaction it is introduced to affect.³ The custom of a city department in charging interest on sums advanced to contractors was held inadmissible, it appearing that the custom had been one way down to the year 1858, under one comptroller, and another way from 1858 to 1878, under other comptrollers.⁴

It is for this reason that a mere act or acts of accommodation do not establish a usage.⁵ A creditor, for example, may indulge a debtor in one or two cases without thereby binding himself to do likewise in the future.⁶ “There are many usages of trade which have nothing to do with the contracts of parties, and which cannot be set up to modify or control them. It is very customary for merchants to pay their debts by checks upon a bank; and this may be very well known to persons who deal with them, and yet no one is bound to receive a check in discharge of a promise to pay money. It may be a custom in some kinds of business to pay workmen in orders for goods, or in goods kept for sale by their employer, or not to pay wages punctually at the time they are due, and the fears or necessities of the laborer may induce him to yield to the custom, and accept payment in a manner or at a time convenient to the employer; but it would hardly be contended that such a custom could be regarded in determining the legal effect of a written agreement.”⁷ Thus, the common act of courtesy which

¹ Murray v. Spencer, 24 Md. 520.

² Johnson v. Stoddard, 100 Mass. 306; Masters v. Penn. R. Co., 50 Pa. St. 374.

³ Mich. Cent. R. Co. v. Coleman, 28 Mich. 440; Walker v. Barron, 6 Minn. 508; Hale v. Gibbs, 43 Ia. 380.

⁴ Fellows v. Mayor, 17 Hun, 247.

⁵ Farlow v. Ellis, 15 Gray, 229; Cincinnati, etc., R. Co. v. Boal, 15 Ind. 345;

Thornton v. Suffolk Manfg. Co., 10 Cush. 378; Norton v. Heywood, 20 Me. 859; Citizens Bk. v. Grafflin, 31 Md. 507.

⁶ Brent v. Cook, 12 B. Mon. 268.

⁷ Metcalf v. Weld, 14 Gray, 230.

induces a man to call on his mechanic to rectify what is amiss in his job does not establish a custom to exonerate the trade from responsibility for bad work.¹

(d) *It must be General.* — Knowledge of the existence of a usage, we shall see, is necessary to bind a person to its terms. Where express notice cannot be proved — which happens very often, as in the majority of cases nothing has been said by the parties in their negotiations about the usage — it becomes necessary to prove that the usage was so general as to raise the presumption that the party knew of it and intended to contract with reference to it.

It is well settled that a usage may be “general,” as this term is used here, notwithstanding that it is confined to a particular city, town, or village.² It may be generally known in that city, town, or village, and be understood by all persons dealing there, and yet may not exist in any place beyond. But the usage of a single house,³ or of one person only,⁴ or of a single mill,⁵ or of one railroad company,⁶ is insufficient. Isolated instances of a certain practice in a particular bank, — as, for instance, the payment of a loss in an unusual case,⁷ — or proof of a few instances of dealings in one or two other banks, do not establish a general usage.⁸ A particular banking usage must apply to a place rather than to a particular bank. It must be the rule of all the banks in the place or it cannot be a valid usage. If every bank, it has been said, could establish its own usage, the confusion and uncertainty which would ensue would greatly exceed any local convenience resulting therefrom.⁹

¹ *Somerby v. Tappan*, 1 Wright, 570.

² *Gleason v. Walsh*, 43 Me. 397; *Thompson v. Hamilton*, 12 Pick. 426; 28 Am. Dec. 619; *Perkins v. Jordan*, 35 Me. 23; *Clark v. Baker*, 11 Metc. 183.

³ *Weber v. Kingsland*, 8 Bosw. 415.

⁴ *Burr v. Sickles*, 17 Ark. 423.

⁵ *Schlessinger v. Dickinson*, 5 Allen, 47; *Stevens v. Reeves*, 9 Pick. 198.

⁶ *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99.

⁷ *Allen v. Merchants' Bk.*, 23 Wend. 215.

⁸ *Chesapeake Bank v. Brown*, 29 Md. 483.

⁹ *Adams v. Otterback*, 15 How. 539.

(e) *It must be Known.* — A usage must be known to the party to be affected by it, before a court will permit its recognition.¹ In the case of general commercial usages which have been recognized by the courts, — all men being taken to know the law, — every member of the community is presumed to know them, and no one will be heard to contradict this presumption.² But in the case of particular usages it is different; knowledge of them is not legally imposed upon the dweller in the particular place, or the dealer in the particular market where they obtain, and is to be shown by express proof, or by evidence of their generality and antiquity.³ These three elements of a valid usage — antiquity (understood not in its common-law meaning, but in the sense of being established), generality and notoriety — are intimately connected, because the first two are so frequently necessary to make good the third.⁴

Therefore if there is a general usage applicable to a particular profession or business, parties employing an individual in that business are supposed to deal with him according to that usage.⁵ “All trades have their usages, and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes a part of it, except when its place is occupied by

¹ *Caldwell v. Dawson*, 4 Metc. (Ky.) 121; *Pierce v. Whitney*, 29 Me. 188; *Martin v. Maynard*, 16 N. H. 186; *Mills v. Ushe*, 16 Tex. 300; *Marlatt v. Olary*, 20 Ark. 251; *Boyd v. Graham*, 5 Mo. App. 408; *Martin v. Hall*, 28 Mo. 388; *Walsh v. Mississippi Transp. Co.*, 52 Mo. 434; *The Albatross v. Wayne*, 16 Ohio, 513; *Wheeler v. Newbould*, 5 Duer, 29; *Bradley v. Wheeler*, 44 N. Y. 500; *Higgins v. Moore*, 34 N. Y. 425; *Dawson v. Kittle*, 4 Hill, 107; *Dodge v. Favor*, 15 Gray, 82; *Fisher v. Sargent*, 10 Cush. 250; *Searson v. Heyward*, 1 Spears, 249; *Whitesell v. Crane*, 8 Watts & S. 389; *McDowell v. Ingersoll*, 5 Serg. & R. 101; *Pitre v. Offutt*, 21 La. An. 679; *Lewis v. The Success*, 18 La. An. 1; *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Sugart v. Mayo*, 54 Ga. 554;

Scott v. Saffold, 37 Ga. 384; *National Bank v. Burkhardt*, 100 U. S. 636; *Bliven v. New England Screw Co.*, 23 How. 420; *Power v. Kane*, 5 Wis. 265; *Scott v. Whitney*, 41 Wis. 504.

² *Rindskoff v. Barrett*, 14 Ia. 101; *Beatty v. Gregory*, 17 Ia. 107.

³ *Sleight v. Hartshorne*, 2 Johns. 532.

⁴ *Lawson Usages & Customs*, § 18.

⁵ *Lawson Usages & Customs*, § 24; *Sewell v. Corp.*, 1 Car. & P. 392; *Given v. Charron*, 15 Md. 502; *Lyon v. George*, 44 Md. 395; *Vaughn v. Gardner*, 7 B. Mon. 326; *Walls v. Bailey*, 49 N. Y. 484; *Ford v. Terrell*, 9 Gray, 401; *Lowe v. Lehman*, 15 Ohio St. 179; *Barton v. McKelway*, 22 N. J. (L.) 165; *Carter v. Philadelphia Coal Co.*, 77 Pa. St. 236.

particular stipulations.”¹ So, those who send goods to a market where a certain custom prevails are presumed to know the custom and to act upon it.² In short, if A makes a contract with B in any particular trade or business, both A and B are presumed to contract with reference to any customs of that trade which may affect their rights.³

On the other hand, a usage not general but confined to a particular person or persons in a particular trade or business will not bind one making a contract unless it is proved that he knew of it.⁴ And a usage is equally inadmissible if it can be shown to have been unknown, at the time of the contract, to the party setting it up and seeking its benefits, for in such a case there would be no presumption that the contract was made with reference to it.⁵

(f) *It must be Peaceable and Acquiesced in.*— A usage must be generally assented to as well as asserted before it can be established; it must be acquiesced in by all persons acting within the scope of its operations.⁶ Where it has been the subject of controversy and contention, claimed by one class and denied by another, and only submitted to under protest and to avoid litigation, it cannot be presumed to have been so acquiesced in as to have entered into and formed a part of the contract.⁷

(g) *It must be Reasonable.*— Courts of law will not enforce unreasonable or absurd usages, however uniform and well known. Parties, in framing their contracts, have a right to disregard them, and cannot be held to have entered into written stipulations with any reference to them.⁸ Hence any usage which in the eye of the law is considered unreasonable is invalid and cannot be set up to affect the

¹ *Pittsburg v. O'Neill*, 1 Pa. St. 343.

² *Deforest v. Fulton Fire Ins. Co.*, 1 Hall, 84; *Bailey v. Bensley*, 87 Ill. 536; *Loneragan v. Stewart*, 55 Ill. 44; *Lyon v. Culbertson*, 5 Cent. L. J. 401.

³ *Lawson Usages & Customs*, § 24.

⁴ *Lawson Usages & Customs*, § 24.

⁵ *Nonotuck Silk Co. v. Fair*, 112 Mass. 354.

⁶ *Strong v. Grand Trunk R. Co.*, 15 Mich. 205; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

⁷ *Dixon v. Dunham*, 14 Ill. 324.

⁸ *Seccomb v. Prov. Ins. Co.*, 10 Allen, 305.

rights of another. The reports contain many cases of this character.¹ To give a few examples, the following usages have been declared void for unreasonableness: A custom authorizing in a contract for goods of a specified character, the delivery of different goods, or on a sale of the goods of one mill, the delivery of the goods of another mill;² a usage that sales of a particular class of goods are subject to the approval of a public inspector, but that if there is no such inspector, a buyer may rescind his purchase at pleasure;³ a usage that no title passes, upon an ordinary sale and delivery, without actual payment of the consideration within a certain number of days;⁴ a custom that if a note is given for a gold mine, and it proves unproductive, or does not turn out according to expectation, it is given up;⁵ a custom of banks not to rectify mistakes unless discovered before the person leaves the room;⁶ a custom of carriers that freight paid in advance may not be recovered back, even though not earned;⁷ a custom that a notice published in three newspapers in a city, of the time and place of landing goods by steamboat, is such a notice as places them at the risk of the consignee;⁸ a custom among the owners of tow-boats that the first coming along side of a ship, on a signal for steam, has an absolute towing-contract;⁹ a custom of a railroad company that before a consignee can obtain his wheat from the company's bins, he must receipt for the quantity;¹⁰ a custom of a railroad company not to

¹ See Lawson *Usages & Customs*, § 38, *et seq.*

² *Beals v. Terry*, 2 Sandf. 127.

³ *Boardman v. Spooner*, 13 Allen, 353.

⁴ *Haskins v. Warren*, 115 Mass. 514.

⁵ "If there be such a custom, it is so unreasonable that it was probably enforced by the bowie-knife." *Leonard v. Peeples*, 30 Ga. 61.

⁶ "If such custom does exist," it was said in this case, "it is contrary to law and ought not to meet with the sanction of a court of justice. The law declares that money received through mistake

shall be refunded; and this rule of law is founded in morality, which makes part of the law of the land. * * * Such a custom in banking institutions may be an evidence of avarice, but not of the practice of justice among those concerned." *Gallatin v. Bradford*, 1 Bibb, 209.

⁷ *Emery v. Dunbar*, 1 Daly, 408.

⁸ *Kohn v. Packard*, 3 La. 224; 23 Am. Dec. 453.

⁹ *Clark v. Gifford*, 7 La. 524.

¹⁰ *Christian v. St. Paul, etc., R. Co.*, 20 Minn. 21.

be responsible for the conduct of its agents in regard to the contents of chartered cars, of which they hold the keys;¹ a usage of plasterers to charge not only for the space covered, but for one-half of the surface occupied by openings;² a custom, in making surveys for locations of government land granted to a settler, to include more land than the warrant actually called for;³ a usage for a broker, employed to purchase stock, to buy the stock for himself, without his principal's knowledge;⁴ a custom that an agent may sell the property of his principal before he is instructed to do so, and on demand of the property back, may tender him similar articles in their stead;⁵ a usage of agents, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and to take in exchange their checks upon banks;⁶ a usage of brokers of tanned skins to insert in the memorandum of sale, unless forbidden by the vendor, and the buyer has an opportunity for examination, a warranty of merchantable quality;⁷ a custom of publishers of newspapers to insert advertisements sent to them without express directions as to the number of insertions, until their publication is expressly countermanded, even after the object of the advertisement has ceased, and that fact is apparent on its face.⁸

¹ "The custom, if it exists, is a most unreasonable one. To hold a key, and yet not be accountable for what is taken out of a car, would be contrary to all sense of right." *Jackson, J.*, in *Central R. Co. v. Anderson*, 58 Ga. 333.

² "The pretended usage of the plasterers in the present instance is unreasonable and bad in itself. To charge an employer with materials never received, is the height of injustice." *Jordan v. Meredith*, 3 Yeates, 318; 2 Am. Dec. 374.

³ *Huston v. McArthur*, 7 Ohio, 70.

⁴ *Pickering v. Demeritt*, 100 Mass. 421.

⁵ *Foley v. Bell*, 6 La. Ann. 760.

⁶ "It is undoubtedly true that men who keep bank accounts are accustomed to give checks for their debts, and in most cases their standing is such that

these checks are taken by their neighbors as readily as cash. This may make a common practice among men who are dealing on their own account in respect to such dealings; but such a practice falls short of a usage applying to the collection of drafts for absent parties. And it is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check, which may turn out to be worthless." *Chapman, C. J.*, in *Whitney v. Esson*, 99 Mass. 308.

⁷ *Dodd v. Farlow*, 11 Allen, 426.

⁸ *Thomas v. Graves*, 1 Mill. Const. 308.

(h) *It must not be Repugnant to the Contract.*—No usage or custom repugnant to the terms of an express contract, either written or verbal, is admissible to control or contradict the terms of such contract.¹ “Usage,” as it is well put in a leading case,² “may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain.” The reason is that when the contract does not speak of the matters to which the usage relates, it may very well be presumed that the parties intended to contract with reference to that usage, while if the contract contains contradictory language, the presumption is that they intended to exclude the usage. Whenever there is a conflict the contract must control. Thus, if a tenant should agree in his lease that the landlord was to have the way-going crop, the custom of the country giving it to the tenant would not be allowed to prevail against the express contract.³ So, where parties agree to leave a mine “in good working order,” a custom among miners to remove the pillars and supports is inadmissible.⁴ So, where a contract of hiring is for a term certain, a custom of the trade for the master or the servant to determine it at any time, without notice, is inadmissible to control the contract.⁵

In *Brown v. Foster*,⁶ A agreed to make B a “satisfactory” suit of clothes. A afterwards delivered the clothes to B, but B returned them to A, with a notice that they did not fit, and were unsatisfactory. In a suit by A against B for the price, it was held that evidence that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations that might be necessary to make them fit, was inadmissible. “When,” said the court, “an express contract, like that

¹ Lawson Usages & Customs, § 206; Partridge v. Ins. Co., 15 Wall. 575; Dixon v. Dunham, 14 Ill. 334.

² Blackett v. Royal Ex. Ins. Co., 2 Cr. & J. 244.

³ Stultz v. Dickey, 5 Binn. 285.

⁴ Randolph v. Holden, 44 Iowa, 327.

⁵ Peters v. Staveley, 15 L. T. (N. S.) 151; Sweet v. Jenkins, 1 R. I. 147; 26 Am. Dec. 243.

⁶ 113 Mass. 136.

shown in the present case, was proved to have been made between parties, it was not competent to control it by evidence of a usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract."

Whether a usage offered in evidence contradicts the meaning of the contract or merely adds something to the instrument is often a difficult question to answer. A good test is believed to be: is the incident which the usage attaches of such a nature that if it were set out in the written contract, it would make it unreasonable or inconsistent? And it has been said to be a safe rule for those who have to decide whether a usage will attach an incident to an express contract or not, to ascertain whether they can be written down together without producing contradiction or nonsense.¹

(i) *It must not Contravene a Statute.*—A custom or usage repugnant to the plain terms of a statute is illegal and void.² If a statute has given a definite meaning to any particular word, it must be understood to have been used with that meaning, and no evidence of custom will be admitted to attach any other meaning to it.³ So, where an officer's duties are prescribed by statute, usage will not excuse their discharge in a different manner.⁴ Thus, where a statute required the demand of acceptance or payment of a bill of exchange to be made in a certain manner, a custom among notaries in the city of New York to make a demand in a different manner was held inadmissible.⁵

¹ Lawson Usages & Customs, § 206.

² Winter v. United States, Hempst. 244; Love v. Hinckley, Abb. Adm. 436; Maury v. Beekman, 9 Paige, 188; Hall v. Reed, 2 Barb. Ch. 500; Coleman v. McMurdo, 5 Rand. 51.

³ Green v. Moffett, 23 Mo. 529; Rodgers v. Allen, 47 N. H. 529; Evans v. Myers, 25 Pa. St. 114; Weaver v. Fegely, 29 Pa. St. 27.

⁴ Delaplaine v. Crenshaw, 15 Gratt.

457; Delaplaine v. Hoxall, 15 Gratt. 459; Trull v. Wheeler, 19 Pick. 240; Scribner v. Hollis, 48 N. H. 30; The Forrester, Newb. Adm. 81; Dwight v. Mayor of Boston, 12 Allen, 316; Crocker v. Schureman, 7 Mo. App. 358; Frasier v. Warfield, 13 Md. 279; Mansfield v. Inhabitants, 15 Gray, 147.

⁵ Ostego Bk. v. Warren, 18 Barb. 204; Com. Bk. v. Varnum, 3 Lans. 90.

A usage to lend and borrow money at a higher rate of interest than is allowed by the statute against usury is void.¹ Where a statute provided that all sales of spirituous and intoxicating liquors should be made for cash, a custom among merchants to sell them at a thirty day's credit is inadmissible.² So where a statute provided that on all negotiable promissory notes payable at a future day certain, in which there was no express stipulation to the contrary, days of grace should be allowed, a usage among banks not to allow days of grace was rejected.³

(j) *It must not Conflict with Public Policy Law.* — A usage of trade is not invalid and evidence of it is not inadmissible simply because it is contrary to the principles of law governing such cases; ⁴ for it is obvious that if proof of a usage could be rejected because it established something different from the law, no custom could ever be proved, because if it were not different it would be a part of the law.⁵ Therefore, a usage or custom is not invalid simply because it is different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of public policy which it is not to the general interest to disturb; if its effect is injurious to the parties themselves in their relations to each other; if, in short, it is an unjust, oppressive, or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom given above, viz., *reasonableness*.⁶

¹ *Dunham v. Dey*, 13 Johns. 40; *Dunham v. Gould*, 16 Johns. 387; *Greene v. Tyler*, 39 Pa. St. 261; *Jones v. McLean*, 18 Ark. 456; *Niagara County Bank v. Baker*, 15 Ohio St. 68.

² *Manasfield v. Inhabitants*, 15 Gray, 149.

³ *Perkins v. Franklin Bank*, 21 Pick. 483.

⁴ Nevertheless, it has been laid down broadly in a number of cases, that a usage or custom in opposition to an es-

tablished rule of law, is of no effect; a conclusion clearly erroneous. See *Warren v. Franklin Ins. Co.*, 104 Mass. 518; *Bargett v. Onent Ins. Co.*, 3 Bosw. 383; *The Pacific*, 1 Deady, 17; *Raisin v. Clark*, 41 Md. 158; *Stillman v. Hurd*, 10 Tex. 109; *Inglebright v. Hammond*, 19 Ohio, 337, and other cases cited in *Lawson Usages & Customs*, § 236.

⁵ *Lawson Usages & Customs*, § 225.

⁶ *Lawson Usages & Customs*, § 243.

CHAPTER X.

THE CONSTRUCTION OF THE CONTRACT.

SECTION 386. First rule of construction — Intent of parties.

387. Second rule — Words understood in their ordinary meaning.

388. Third rule — Whole instrument looked to.

389. Subsidiary rules of construction.

§ 386. **First Rule of Construction — Intent of Parties.** — In the construction of contracts the main object is to ascertain the intention of the parties.¹ All rules of construction have this end in view and hence when there is no doubt as to the intention of the parties the technical rules of construction ought not to be resorted to.² Therefore the first main rule of construction is that when the meaning of language is to be determined by the court the intent of the parties, expressed in the words they have used, must govern.³

§ 387. **Second Rule — Words Understood in Their Ordinary Meaning.** — The second main rule is that words are to be understood in their ordinary and popular meaning.⁴ The law presumes that a person meant what his language, by its terms and under the circumstances in which

¹ *Matthews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; *Smith v. Kerr*, 106 N. Y. 31; 3 Am. St. Rep. 362; *Field v. Lester*, 118 Ill. 17; *Flagg v. Eames*, 40 Vt. 21; *Hunter v. Miller*, 6 B. Mass. 619; *Gray v. Clark*, 11 Vt. 583.

² *Noyes v. Nichols*, 28 Vt. 639; *Walker v. Tucker*, 70 Ill. 527; *Dwight v. Ins. Co.*, 108 N. Y. 347; *Williamson v. McClure*, 37 Pa. St. 409; *Connell v. New Orleans*, 35 La. Ann. 273.

³ *Melick v. Pidcock*, 44 N. J. (Eq.) 525; 6 Am. St. Rep. 901; *Edwards v. Bowden*, 99 N. O. 80; 6 Am. St. Rep. 437. The particular intent will govern the general intent; *Dawes v. Prentice*, 16 Pick. 435.

⁴ *Hawes v. Smith*, 12 Me. 429; *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio. 385; *Stearns v. Sweet*, 78 Ill. 446; *Donahue v. McNulty*, 24 Cal. 411; 35 Am. Dec. 73.

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it was used, would be fairly understood to mean, and this presumption cannot be rebutted by proof that he intended something more or different which he did not express, and which the person dealing with him neither understood nor had reason to understand.¹ This is, of course, subject to evidence that by usage of trade or otherwise the words here acquired a peculiar meaning;² and technical words are to be interpreted as usually understood by persons in the profession or business to which they relate;³ (unless, it must be observed, they are clearly used in a different sense;⁴ for it is obvious that if the expressions and phrases used by unprofessional men in their various negotiations were always to be taken in their technical sense, the interpretation would often violate their true intent and meaning).⁵

§ 388. **Third Rule — Whole Instrument Looked to.**—The third main rule is that that construction will be given which will best effectuate the intention of the parties to be collected *from the whole of the agreement*;⁶ and to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it and the objects which they had in view.⁷

¹ Clark v. Little, 39 Vt. 405.

² *Ante*, § 383.

³ Dana v. Fielder, 12 N. Y. 40; Gauch v. Ins. Co., 88 Ill. 251; Ellmaker v. Ellmaker, 4 Watts. 89. See *ante*, § 383.

⁴ Jackson v. Myers, 8 Johns. 388; Bowman v. Long, 89 Ill. 19, 21.

⁵ Wynkoop v. Cowing, 21 Ill. 581.

⁶ Inconsistencies in a deed are to be reconciled, if possible. The old rule that the earlier clause controls the later one is only applicable when reconciliation is impossible. Waterman v. Andrews, 14 R. I. 539. So the construction of a deed which requires the rejection of a whole clause thereof will not be adopted, except from unavoidable necessity. City of Allen v. Trans. Co., 12 Ill. 38; 52 Am. Dec. 479. The clauses may be transposed so as to give

it its apparent construction. Staton v. Mullis, 92 N. C. 623.

⁷ Mobile, etc., R. R. Co. v. Jurey, 111 U. S. 584; Strong v. Gregory, 19 Ala. 46; The Ida. Dav. 407; Lemmons v. Flanakin, 1 Hemp. 32; Benjamin v. McConnell, 9 Ill. 536; 46 Am. Dec. 474; Conwell v. Pumphrey, 9 Ind. 135; 68 Am. Dec. 611; Montgomery v. Firemen's Ins. Co., 16 B. Mon. 437; Lacey v. Green, 84 Pa. St. 514; Murray v. Carothers, 1 Met. 71; White v. Booker, 4 Met. 237; Akin v. Drummond, 2 La. Ann. 92; Field v. Woodmancy, 10 Cush. 427; Fenfold v. Ins. Co., 85 N. Y. 317; Edelman v. Yeakel, 27 Pa. St. 26; Reed v. Ins. Co., 95 U. S. 23; Wilson v. Roots, 119 Ill. 379; Rockford v. Ins. Co. 65 Ill. 415; Nash v. Towne, 5 Wall. 699; Grabb v. Grabb, 101 Pa. St. 11.

This rule may seem to conflict with the second main rule, but the meaning is this, that men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear.¹

§ 389. **Subsidiary Rules of Construction.** — Subsidiary to these three main rules there are a number of others all tending to the same end, the effecting of the intention of the parties to the contract so far as it can be discerned; and these rules are:

1. Courts will examine the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect,² for it is to be presumed that each part was inserted for a purpose and has its office to perform.³ So where two clauses are inconsistent they should be construed so as to give effect to the intention of the parties as gathered from the whole instrument.⁴ So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties.⁵

2. They will, where two or more instruments are executed at the same time, relate to the same subject-matter, and one refers to the other, either tacitly or expressly, take them together and construe them as one instrument.⁶ So where two instruments are executed as parts of the same transaction and agreement, whether at the same or different times, they will be taken and construed together.⁷

¹ *Anson Contr.* 262; *Canal Co. v. Hill*, 15 Wall. 94; *Walker v. Douglass*, 70 Ill. 445.

² *O. B. & Q. R. R. Co. v. Aurora*, 99 Ill. 208; *Goosey v. Goosey*, 48 Miss. 217; *Ward v. Whitney*, 8 N. Y. 446; *Heywood v. Perin*, 10 Pick. 230; *McCarty v. Howell*, 24 Ill. 341; *Davis v. Elder*, 53 Ill. 417; *Bowman v. Long*, 89 Ill. 19; *Rich v. Lord*, 18 Pick. 322; *Bell v. Bruen*, 1 How. 169.

³ *Alton v. Transportation Co.*, 12 Ill. 56.

⁴ *Bent v. Alexander*, 15 Mo. App. 181.

⁵ *Richardson v. Palmer*, 38 N. H. 212; *Moore v. Griffin*, 23 Me. 350; *Howell v. Howell*, 7 Ired. 491; 47 Am. Dec. 335.

⁶ *Adams v. Hill*, 18 Me. 215; *Vaughn v. Taylor*, 18 Ark. 63; *Dillingham v. Estill*, 3 Dana, 23; *Rorabacher v. Lee*, 16 Mich. 169; *Rogers v. Kneeland*, 18 Wend. 114; *Spangler v. Springer*, 22 Pa. St. 454; *Sewall v. Henry*, 9 Ala. 24; *Logan v. Tibbett*, 4 G. Greene, 399.

⁷ *Stacey v. Randall*, 17 Ill. 487; *Hill v.*

3. They will reject words which are wholly inconsistent with the nature of the contract or the manifest intention of the parties.¹ And, if no meaning can be given to a word from the connection in which it is used, consistently with the intent on an examination of the whole instrument, it will be treated as surplusage.²

4. In the interpretation of a contract of which a portion is printed and a portion written, they will give greater weight to the written portion than to the printed words, where they are in conflict and tend to different results;³ for, as has been well said, the language of printed blanks prepared for general use is readily assumed to be appropriate in the particular instance without careful examination, and hence it is not so likely to express the real intention of the parties as the written words specially selected by themselves for the particular transaction.⁴ But this rule only applies where the written and printed parts cannot, upon any reasonable construction, be reconciled.⁵

5. They will not, however broad may be the words of a contract, extend them to those things concerning which it appears that the parties did not intend to contract.⁶

6. They will consider general words following particular or specific terms as restricted in meaning to those things or matters which are of the same kind with those first

Huntress, 43 N. H. 480; Stephens v. Baird, 9 Cow. 274; Makepeace v. Harvard College, 10 Pick. 302; 20 Am. Dec. 521; Sibley v. Holden, 10 Pick. 250; Hunt v. Livermore, 5 Pick. 395; Meriden Britannia Co. v. Zingsen, 4 Robt. 812; Brandreth v. Sandford, 1 Duer, 390; Cordray v. Mordecai, 2 Rich. 518; Wallis v. Beauchamp, 15 Tex. 303; Strong v. Barnes, 11 Vt. 221; 84 Am. Dec. 684; Duncan v. Charles, 5 Ill. 561; Reed v. Field, 15 Vt. 672; Norton v. Kearney, 10 Wis. 443; Berry v. Wisdom, 3 Ohio St. 241.

¹ Salmon Falls Manfg. Co. v. Portsmouth Co., 46 N. H. 249; Buck v. Burk, 18 N. Y. 337; Hibbard v. McKinsley, 28 Ill. 240; Iredell v. Barbee, 9 Ired. 250; Stockton v. Turner, 7 J. J. Marsh. 192.

² Tucker v. Meeks, 2 Sweeney, 736.

³ Clark v. Woodruff, 88 N. Y. 518; Russell v. Bondie, 51 Mich. 76; Thornton v. R. R. Co., 84 Ala. 109; 5 Am. St. Rep. 337; Howland v. Commercial Ins. Co., Anth. 31; American Ex. Co. v. Pinckney, 29 Ill. 392; People v. Dulaney, 96 Ill. 503; Chadsey v. Gulon, 97 N. Y. 333; Woodruff v. Commercial, etc., Ins. Co., 2 Hilt. 122; Howard Fire Ins. Co. v. Bruner, 23 Pa. St. 50.

⁴ Benj. Prin. of Contr. 107.

⁵ Wheeling, etc., R. R. Co. v. Gourley, 99 Pa. St. 171.

⁶ Hoffman v. Ins. Co., 33 N. Y. 405; Gage v. Tirrell, 9 Allen, 299; Frisby v. Ballance, 4 Scam. 287; Robinson v. Stow, 39 Ill. 568.

mentioned.¹ So, general expressions will be restricted by particular descriptions or additions appended to them.²

7. They will consider, where the intent is doubtful, the manner in which the contract has been executed by both or one of the parties with the express or implied assent of the other.³ Yet, where the meaning is clear, an erroneous construction of it by the parties will not control its effect.⁴

8. They will, where the meaning of the language used is doubtful, or susceptible of two senses, adopt that meaning which would give effect to the instrument as a legal contract, rather than that which would render it inoperative.⁵

9. They will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.⁶

10. They will not be precise in following the rules of grammatical construction, for neither false English nor bad Latin will matter when the meaning of the party is apparent.⁷ A writing untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography may be valid if there be sufficient words to declare clearly and legally the party's meaning.⁸

11. Punctuation may sometimes shed light upon the

¹ *Terrance v. McDougald*, 12 Ga. 526; *Vaughan v. Porter*, 16 Vt. 266; *Baxter v. State*, 9 Wis. 38.

² *Leake on Contr.* 378.

³ *Camden, etc., R. Co., v. Lippincott*, 45 N. J. (L.) 418; *Chicago v. Sheldon*, 9 Wall. 50; *People v. Murphy*, 119 Ill. 159; *Farrar v. Bowley*, 2 La. Ann. 475; *D'Aquin v. Barbour*, 4 La. Ann. 441; *Oasey v. Pennoyer*, 6 La. Ann. 776; *Topliff v. Topliff*, 123 U. S. 121; *Matthews v. Danahy*, 26 Mo. App. 660; *Jennings v. Machine Co.*, 138 Mass. 594.

⁴ *Railroad v. Trimble*, 10 Wall. 367.

⁵ *Thrall v. Newall*, 19 Vt. 202; 47 Am. Dec. 693; *Lorillard v. Hyde*, 86 N. Y. 384; *Findley v. Armstrong*, 23 W. Va. 118; *Evans v. Sanders*, 8 Port. 497; 33 Am. Dec. 397; *Riley v. Vanhouton*, 5 Miss. 423; *Peckham v. Haddock*, 36 Ill. 33; *Morancy v. Dumeauil*, 3 La. Ann.

363; *Steinspring v. Bennett*, 16 La. Ann. 201; *Archibald v. Thomas*, 3 Cow. 284; *Hunter v. Anthony*, 8 Jones, 235; 80 Am. Dec. 333; *Peckham v. Haddock*, 36 Ill. 38; *Field v. Leiter*, 118 Ill. 17; *Orittenden v. French*, 21 Ill. 578; *Atwood v. Cobb*, 16 Pick. 329; *Hobbs v. McLean*, 117 U. S. 567; *U. S. v. R. R. Co.*, 118 U. S. 235; *Saunders v. Clark*, 29 Cal. 299.

⁶ *Russell v. Allerton*, 108 N. Y. 288; *Wilson v. Marlow*, 66 Ill. 385; *Royalton v. Turnpike Co.*, 14 Vt. 311; *Bickford v. Cooper*, 41 Pa. St. 142; *Gale v. Dean*, 20 Ill. 320; *Crabtree v. Hagenbaugh*, 25 Ill. 233.

⁷ *Hancock v. Watson*, 18 Cal. 140; *Jackson v. Topping*, 1 Wend. 338; 19 Am. Dec. 515.

⁸ *Cobb v. Hines*, Busb. 343; 59 Am. Dec. 559.

meaning of the parties, but a writing may be examined without such aid;¹ and it is never allowed to overturn what seems the plain meaning of the whole contract.²

12. They will construe doubtful words most strongly against the party who used them.³ This rule is based on the principle that a man is responsible for ambiguities in his own expression and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.⁴ Therefore a deed is construed most strongly against the grantor;⁵ and where a deed will inure in several ways, the grantee may elect in which way to take it.⁶ And a clause in a promissory note will be construed most strongly against the maker;⁷ a clause in a policy of insurance most strongly against the insurer;⁸ because in each case the party is presumed to have chosen the words used.

But this rule is the last one which courts apply, and will never be resorted to so long as a satisfactory result can be reached by the other rules of construction.⁹ And the rule

¹ *White v. Smith*, 33 Pa. St. 186; 75 Am. Dec. 589; *Ewing v. Burnet*, 11 Pet. 41; *Bruensman v. Carroll*, 52 Mo. 213; *Beirne v. Wells*, 94 N. C. 67.

² *Osborn v. Farwell*, 87 Ill. 89; *Ewing v. Burnet*, 11 Pet. 54.

³ *Barney v. Newcomb*, 9 Oush. 46; *Noonan v. Bradley*, 9 Wall. 394; *Deblois v. Earle*, 7 R. I. 26; *Richardson v. People*, 85 Ill. 495; *Evans v. Sanders*, 8 Port. 497; 33 Am. Dec. 297; *Livingston v. Arrington*, 28 Ala. 494; *Union Bank v. Guice*, 2 La. Ann. 249; *Crowley v. Concordia*, 3 La. Ann. 224; *Hoover v. Miller*, 6 La. Ann. 204.

⁴ *Anson Contr.* 253; *Hoffman v. Ins. Co.*, 33 N. Y. 405; *Wells v. Carpenter*, 65 Ill. 450; *McCarty v. Howell*, 24 Ill. 343.

⁵ *Rung v. Shoneberger*, 2 Watts, 23; 26 Am. Dec. 85; *City of Alton v. Ill. Trans. Co.*, 12 Ill. 38; 62 Am. Dec. 479; *Sharp v. Thompson*, 100 Ill. 447; *Pike v.*

Monroe, 36 Me. 309; 58 Am. Dec. 751; *Com. v. Erie R. R. Co.*, 37 Pa. St. 339; 67 Am. Dec. 471; *Dodge v. Walley*, 23 Cal. 224; 33 Am. Dec. 61; *Waterman v. Andrews*, 14 R. I. 589. So an exception or reservation in a deed is to be construed strictly against the grantor. *Ocoheco Man. Co. v. Whittier*, 10 N. H. 305; *Jackson v. Gardner*, 8 Johns. 394; *Duryea v. Mayor*, 63 N. Y. 592; *U. S. Mortgage Co. v. Gross*, 33 Ill. 483.

⁶ *Jackson v. Hudson*, 3 Johns. 375; 3 Am. Dec. 500.

⁷ *Walker v. Kimball*, 22 Ill. 537; *Maasie v. Belford*, 68 Ill. 290.

⁸ *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Reynolds v. Ins. Co.*, 47 N. Y. 597; *Ins. Co. v. Slaughter*, 12 Wal. 404.

⁹ *Flagg v. Eames*, 40 Vt. 16; 94 Am. Dec. 367; *Adams v. Warner*, 23 Vt. 411; *Falley v. Giles*, 29 Ind. 114.

is applicable only to such words as can be attributed to the one party and not to words that are the common language of both parties.¹ And the rule is not applied where it would cause a penalty or forfeiture and therefore the condition of a bond is construed favorably for the obligor.²

¹ Beckwith v. Howard, 6 R. I. 1.

Chicago, etc. v. Aurora, 99 Ill. 214;

² Butler v. Wigge, 1 Wm. Saund. 66; Bennehan v. Webb, 6 Ired. 57.

PART IV.

THE DISCHARGE OF THE CONTRACT.

§ 390. INTRODUCTORY.

§ 390. Introductory.— Having considered the Formation of the contract, its Operation when formed, and its Interpretation when its terms are disputed by the parties to it, we have next to consider the modes in which the contractual tie may be loosened, and the parties freed from the rights and liabilities which have arisen under the contract. And it will be found that a contract may be discharged in any one of the following ways: I. By agreement. II. By performance. III. By impossibility of performance. IV. By operation of law. V. By breach.

CHAPTER XI.

DISCHARGE BY AGREEMENT.

SECTION 391. Methods of discharge by agreement.

(a) *Waiver or Cancellation.*

392. Executory contract may be waived or cancelled.

393. But not executed contract.

394. Exception — Negotiable instruments.

(b) *Substituted Agreement.*

395. Express substituted contract.

396. Form of substituted contract.

397. Implied substituted contract.

398. Express novation.

399. Implied novation.

(c) *Conditions in Contract.*

400. Conditions subsequent.

401. Non-fulfillment of term in contract.

402. Occurrence of particular event.

403. Option to determine contract.

§ 391. **Methods of Discharge by Agreement.** — It is obvious that a contract which has been entered into between two persons may be put an end to in the same manner as it was created, viz.: by Mutual Agreement. And this may be done (a) by a waiver or cancellation of the contract, (b) by a substituted agreement between the parties, or (c) by a condition in the contract itself.

(a) *Waiver or Cancellation.*

§ 392. **Executory Contract may be Waived or Cancelled.** — An agreement to discharge a contract is, like all other agreements, required to have a consideration to support it. Where the contract is executory no further con-

sideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities under the contract. The consideration for the promise of either party is the abandonment by the other of his rights under the contract.¹

§ 393. **But Not Executed Contract.** — On the other hand, an executed contract, *i. e.*, a contract in which one of the parties has performed all that is due from him, cannot be discharged by a parol waiver. The common law knows nothing of the abandonment of such a claim, except by release under seal, or for consideration.²

§ 394. **Exception — Negotiable Instruments.** — To this rule there is an important exception in the case of bills of exchange and promissory notes. The rights of the holder of such instruments may be waived and discharged without any consideration for their waiver, by his surrendering or destroying the instruments with the intention of releasing the parties liable upon them.³

(b) *Substituted Agreement.*

§ 395. **Express Substituted Contract.** — A contract may be discharged by an alteration by the parties in its terms which substitutes a new agreement for the old one. The difference between this and the mode of discharge by agreement just mentioned lies in the fact that the first is a total

¹ Collyer v. Moulton, 9 R. I. 90; 98 Am. Dec. 370; Cox v. Carrell, 6 Iowa, 353; Stryker v. Vanderbilt, 25 N. J. (L.) 482; Fleming v. Gilbert, 8 Johns. 520; Blood v. Goodrich, 9 Wend. 68; 24 Am. Dec. 121; Thrall v. Mead, 40 N. H. 540; Miles v. Roberts, 34 N. H. 245; Kelly v. Bliss, 54 Wis. 187; Fine v. Rogers, 15 Mo. 315; Byrne v. Bertrand, 7 Ark. 321; Smith v. Tunno, 1 McCord Ch. 443; 16 Am. Dec. 617; Johnson v. Reed, 9 Mass. 78; 6 Am. Dec. 36.

² Crawford v. Millsbaugh, 13 Johns. 57; Moore v. Detroit Loc. Works, 14 Mich. 266; Kidder v. Kidder, 33 Pa. St. 268; Collyer v. Moulton, 9 I. R. 90; 98 Am. Dec. 370.

³ Vanderbeck v. Vanderbeck, 30 N. J. (Eq.) 270; Bragg v. Donielson, 141 Mass. 196; Beach v. Andress, 51 Barb. 570; Larkin v. Hardenbrook, 90 N. Y. 533; Paxton v. Wood, 77 N. C. 11; Re Campbell's Estate, 7 Pa. St. 100; Albert v. Zeigler, 29 Pa. St. 50.

obliteration of the contract, the second is a substitution of a new bond between the parties in place of the old one. A claim under the original contract may then be met by the new agreement so far as the latter operates to alter or rescind the former.¹

The change of rights and liabilities, and consequent extinction of those which before existed, forms the consideration on each side for the new contract.

§ 396. **Form of Substituted Contract.** — The form in which the new agreement must be depends, as a rule, upon the form of the old.

If the contract was under seal it cannot while executory be varied or altered or released or rescinded by a parol executory agreement.² While in England the rule is that a parol agreement to vary a contract under seal is not valid, even when it has been acted upon by the parties, such is not the prevailing rule in this country.³ It is laid down in the Supreme Court of the United States: "Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity."⁴

¹ *Smith v. Tunno*, 1 McCord, Ch. 448; 16 Am. Dec. 617; *Johnson v. Reed*, 9 Mass. 78; 6 Am. Dec. 39; *Dunham v. Barnes*, 9 Allen, 352; *Howard v. Wilmington*, etc., R. R. Co., 1 Gill, 311; *Stewart v. Keteltas*, 38 N. Y. 338; *Reed v. McGrew*, 5 Ohio, 375; *Rogers v. Rogers*, 139 Mass. 440; *Church v. Florence Iron Works*, 45 N. J. (L.) 129; *Norton v. Browne*, 87 Ind. 333; *Christman v. Hodges*, 75 Mo. 413; *Munford v. Wilson*, 15 Mo. 540; *Maxwell v. Graves*, 59 Ia. 613; *Baum v. Covert*, 63 Miss. 113; *Reed v. McGrew*, 5 Ohio, 55; *Teal v. Bilby*, 123 U. S. 572; *Farrar v. Tolliver*, 88 Ill. 408.

² *Delacroix v. Buckley*, 13 Wend. 71; *Allen v. Jacquist*, 21 Wend. 628; *Chapman v. McGrew*, 20 Ill. 101; *Barnett v. Barnes*, 73 Ill. 216; *Loach v. Farnum*, 90 Ill. 368; *Segard v. Patterson*, 3 Blatchf.

357; *Sherwin v. R. R. Co.*, 24 Vt. 347; *French v. New*, 23 N. Y. 150; *Smith v. Lewis*, 24 Conn. 641.

³ *Anson Contr.* 268, Prof. Knowlton's notes, citing *Allen v. Jacquish*, 21 Wend. 632; *Jewett v. Schoepel*, 4 Cow. 564; *Dearborn v. Cross*, 7 Cow. 48; *Monroe v. Perkins*, 9 Pick. 296; *Green v. Wells*, 2 Cal. 584; *Le Fever v. Le Fever*, 4 Serg. & R. 241; *Cook v. Murphy*, 70 Ill. 96; *Whiting v. Heslep*, 4 Cal. 327; *Lawrence v. Dole*, 11 Vt. 555; *Cabe v. Jameson*, 10 Ired. 193; *McMurphy v. Garland*, 47 N. H. 323; *Robinson v. Bullock*, 66 Ala. 554; *Mill Dam Foundry v. Henry*, 21 Pick. 429; *Lawrence v. Miller*, 86 N. Y. 131; *Jenks v. Robertson*, 58 N. Y. 621; *Hyderville Co. v. Eagle R. R. & Slate Co.*, 44 Vt. 395.

⁴ *Canal Co. v. Ray*, 101 U. S. 522.

But the parol contract must be executed or it will not operate as a discharge or rescission of the specialty.¹

If the original contract was put in writing merely by agreement of the parties, and not in pursuance of any statutory requirement, the new agreement, in alteration or discharge, is not required to be in writing, and may be proved by parol evidence.² This follows from the principle shown in a previous chapter³ that the writing is not the agreement but the evidence of it, and that as the essentials of agreement lie in the expressed intention of the parties and not in the writing, which is the instrument of that expression, the contract may be discharged by a valid expression of the intention to put an end to it.

But if the original contract was required by the statute of frauds or any other statute, to be in writing, the new contract must also be in writing.⁴

§ 397. Implied Substituted Contract. — The rescission may be implied as well as express. Thus if agreements be made between the same parties concerning the same matter, and the terms of the latter are inconsistent with those of the former, so that they cannot subsist together, the latter will be construed to discharge the former.⁵ But the

¹ *Unthlenk v. Henry County Turnp. Co.*, 6 Ind. 126; *McMurphy v. Garland*, 47 N. H. 323, 323; *Buell v. Miller*, 4 N. H. 126.

² *Robinson v. Batchelder*, 4 N. H. 40; *Fleming v. Gilbert*, 3 Johns. 528; *Stearns v. Hall*, 9 Cush. 31; *Dodge v. Crandall*, 30 N. Y. 307; *Munroe v. Perkins*, 9 Pick. 298; 20 Am. Dec. 475; *Blood v. Enos*, 12 Vt. 625; 36 Am. Dec. 363; *Spann v. Baltzell*, 1 Fla. 301; 48 Am. Dec. 546; *McGrann v. R. R. Co.*, 29 Pa. St. 82; *Low v. Forbes*, 18 Ill. 568; *Seaman v. O'Hara*, 29 Mich. 66; *Brown v. Everhard*, 52 Wis. 205; *Aldrich v. Price*, 57 Ia. 151; *McNichols v. Reynolds*, 95 Pa. St. 433; *Swain v. Seamens*, 9 Wall. 254; *Thurston v. Ludwig*, 6 Ohio St. 1; *Wiggin v. Goodwin*, 63 Me. 389; *Flanders v. Fay*, 40 Vt. 316; *Bryan v. Hunt*, 4 Sand. 543; *Keating v. Price*, 1

Johns. Cas. 222; 1 Am. Dec. 92; *Solomons v. Jones*, 3 Brev. 54; 5 Am. Dec. 538; *Grafton Bank v. Woodward*, 5 N. H. 99; 20 Am. Dec. 566; *Langworthy v. Smith*, 2 Wend. 587; 20 Am. Dec. 652; *Deshazo v. Lewis*, 5 Stew. & P. 91; 24 Am. Dec. 769.

³ *Ante*, Chap. III.

⁴ *Goss v. Lord Nugent*, 5 Barn. & Adol. 65; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; *Hasbrouck v. Tappan*, 15 Johns. 204; *Swain v. Seamens*, 9 Wall. 272; *Schultz v. Bradley*, 57 N. Y. 646; *Hill v. Blake*, 97 N. Y. 216; *Organ v. Stewart*, 60 N. Y. 413; *Musaelman v. Stoner*, 31 Pa. St. 235; *Abel v. Munson*, 18 Mich. 312; *Packer v. Stewart*, 24 Vt. 133; *Dana v. Hancock*, 20 Vt. 616; *Carpenter v. Galloway*, 73 Ind. 418.

⁵ *Renard v. Sampson*, 12 N. Y. 561;

intention to discharge the original contract must distinctly appear from the inconsistency of the new terms with the old ones. By a mere postponement of performance, for the convenience of one of the parties, the contract is not discharged.¹

§ 398. **Express Novation.** — A contract is frequently discharged by a change in the parties thereto, whereby a new party is substituted for a previous one by agreement of all three, while the terms remain the same. This is called a Novation.²

For example A sells B a wagon. B afterwards sells it to C who agrees to pay A the price which B had agreed to pay A for it and A agrees to take C as his debtor for the price. The debt due to A from B is extinguished.³ Or suppose A owes B \$100, and B owes C \$100, and the three meet, and it is agreed between them that A shall pay C the \$100. B's debt is extinguished, and C may recover that sum against A. In the case supposed, C gives a consideration for the promise of A to him in the satisfaction and discharge of the debt of B, and receives a consideration for his discharge of B in the promise of A; A receives a consideration for his promise to C in the satisfaction and discharge of his debt to B; B receives consideration for the discharge of his debt to A in the satisfaction and discharge of his debt to C.⁴

It is essential, however, to a valid novation that all the parties to it consent to it,⁵ for it requires the consent of

Murray v. Harway, 56 N. Y. 337; *Green v. Wells*, 2 Cal. 584; *Wheeden v. Fiske*, 50 N. H. 125; *Stow v. Russell*, 26 Ill. 18; *Harrison v. Polar Star Lodge*, 116 Ill. 279; *Paul v. Meservey*, 58 Me. 421.

¹ *Lawson v. Hogan*, 28 N. Y. 39; *McCombs v. McKennan*, 3 W. & S. 216; *Bacon v. Cobb*, 45 Ill. 47.

² *Heaton v. Angier*, 7 N. H. 397; 28 Am. Dec. 233; *American Lumber Co. v. Mulcrane*, 53 Mich. 622; *Finan v. Babcock*, 58 Mich. 301; *York v. Orton*, 65 Wis.

6; *Foster v. Paine*, 68 Iowa, 85; *Parsons v. Tillman*, 25 Ind. 432; *Guichard v. Brande*, 57 Wis. 534; *McClellan v. Robe*, 28 Ind. 298; *Cadens v. Teasdale*, 53 Vt. 469; 38 Am. Rep. 697; *McKinney v. Alvis*, 14 Ill. 24.

³ *Heaton v. Angier*, *supra*.

⁴ The statute of frauds does not apply to a contract of novation. *Mulcrane v. Amer. Lumber Co.*, 55 Mich. 626.

⁵ *McKinney v. Alvis*, 14 Ill. 23; *Butterfield v. Hartshorn*, 7 N. H. 345; 28 Am.

the parties to the old contract to rescind the old one, and of the parties to the new contract to create the new one.¹ And it must appear that the original indebtedness was extinguished.²

§ 399. *Implied Novation.* — The novation may take place through the conduct of the parties indicating an acquiescence in a change of liability, as well as by an express agreement. Thus if A has entered into a contract with B and C, and B and C agree among themselves that C shall retire from the contract and cease to be liable upon it, A may either insist upon the continued liability of C, or he may treat the contract as broken and discharged by the renunciation of his liabilities by one of the parties to it. If, however, A, after he becomes aware of the retirement of C from the contract, continues to deal with B as though no change had taken place, he will be considered to have entered into a new contract to accept the sole liability of B, and will not be entitled to hold C to his original contract.

Such a transaction frequently occurs upon a change in a firm of partners; the debt of the original firm may, by the creditor's conduct in his dealings with the new firm,³ be effectually transferred to the new firm, so as to render them liable to the creditor in substitution of the former.⁴

(c) *Conditions in Contract.*

§ 400. *Conditions Subsequent.* — A contract may provide, either expressly or impliedly, that upon the happening

Dec. 741; *Reid v. Degener*, 83 Ill. 508; *Carnier v. Taylor*, 19 N. H. 189; *Lynch v. Austin*, 53 Wis. 287.

¹ *Murphy v. Hanrahan*, 50 Wis. 485.

² *Jandon v. Randall*, 47 N. Y. Super. Ct. 374; *Irwin v. Atkins*, 7 Ill. App. 17; *Butterfield v. Hartshorn*, 7 N. H. 245; 26 Am. Dec. 741.

³ As, for example, by his accepting a note for his debt from the new firm.

Waydell v. Luer, 3 Denio, 410; overruling s. c. 5 Hill, 448.

⁴ *Hart v. Alexander*, 2 M. & W. 484; *Thompson v. Percival*, 5 B. & Ad., 925; *Lyth v. Ault*, 7 Ex. 669; *Luddington v. Bell*, 77 N. Y. 141; *Maier v. Canavan*, 8 Daly, 273; *Millard v. Thorn*, 56 N. Y. 402; *Stone v. Chamberlain*, 30 Ga. 239; *Maxwell v. Day*, 45 Ind. 509; *Powell v. Charles*, 34 Mo. 485.

of some event or contingency it shall cease and be discharged. These circumstances may be the non-fulfillment of a specified term of the contract; the occurrence of a particular event; or the exercise by one of the parties of an option to determine the contract.

§ 401. **Non-fulfillment of Term in Contract.**— By the terms of the contract the non-fulfillment of a certain term in it may give to one of the parties the right to treat it as discharged. Thus, chattels may be purchased under an agreement that if on examination they do not answer the description under which they are sold, they may be returned to the seller within a certain time. The effect of such a condition is to vest the property in the buyer subject to a right of rescission in a particular event, when it reverts in the seller, and any loss or damage suffered by the property during that time will fall on the seller,¹ unless it was caused by the fault of the buyer, in which event his right of return is lost.²

In *Head v. Tattersall*,³ A bought a horse of B. The contract of sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned by the day named, but as it had in the meantime been injured, though by no fault of A, B disputed the right of A to return it. But it was held that he was entitled to do so.

Where the seller is not notified or the goods not returned within the prescribed time, the sale becomes absolute and the

¹ *Head v. Tattersall*, L. R. 7 Ex. 7; *Hunt v. Wyman*, 100 Mass. 198; *Dearborn v. Turner*, 16 Me. 17; *Boswell v. Bicknell*, 17 Mo. 344; *Martin v. Adams*, 104 Mass. 262; *McKinney v. Bradley*, 117

Mass. 321; *Kimball v. Vroman*, 35 Mich. 237.

² *Ray v. Thompson*, 12 Oush. 281.

³ L. R. 7 Ex. 7.

buyer becomes liable for the price.¹ Where the contract does not fix the time, the option must be exercised within a reasonable time.² And the question, what is a reasonable time, is one of fact for the jury to be determined under all the circumstances of the particular case.³

§ 402. **Occurrence of Particular Event.** — The parties may introduce into the terms of their contract a provision that the fulfillment of a condition or the occurrence of an event shall discharge either one or both from further liabilities under the contract. Such a provision is well illustrated by the case of a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond. So, leases are usually made subject to conditions of discharge, on the part of the lessor, upon default in payment of rent or some other breach of a covenant and on the part of the lessee, upon the premises being destroyed by fire or rendered uninhabitable or not kept in repair.

A provision for discharge may be implied as well as express, as in the case of a common carrier, whose obligation is that of an insurer of the safe delivery of the goods intrusted to his care. But he is not liable for losses caused by the "act of God" or the "public enemy." These events are implied terms in every contract made by a carrier, and their occurrence exonerates him from liability for any losses incurred through their agency.⁴ These exceptions from the general liability of the common carrier being a known and understood term in every contract which he makes, the discharge arising from such causes is to be distinguished from discharge arising from the subsequent impossibility of performance not expressly provided

¹ Tiedeman Sales, § 218.

² Hickman v. Shimp, 109 Pa. St. 16; Quinn v. Stout, 81 Mo. 160; Spickler v. Marsh, 36 Md. 222; Washington v. Johnson, 7 Humph. 468.

³ Washington v. Johnson, 7 Humph.

468; Cooper v. Carlisle, 2 Green (N. J.), 525; Hall v. Meriwether, 19 Tex. 294.

⁴ Lawson Contr. Carr., Cap. I.

against in the terms of a contract, with which we shall deal hereafter.¹

§ 403. **Option to Determine Contract.** — A contract may provide that it shall be determinable at the option of one of the parties upon certain terms. Contracts of hire of personal services are usually made determinable by notice to be given by either party,² and in a contract of service, not limited to any time, there is an implied provision that it may be terminated by either party upon a reasonable notice.³

¹ See Chap. XIII.

² Lawson Rights, Rem. & Pr., § 251L.

³ Ward v. Ruckman, 34 Barb. 419.

CHAPTER XII.

DISCHARGE BY PERFORMANCE.

SECTION 404. Introductory.

(a) Performance.

- 405. Performance must follow terms of contract.
- 406. Rule in equity.
- 407. Time of performance.
- 408. Rule in equity.
- 409. Performance of conditional promises.

(b) Payment.

- 410. Non-payment of debt when due.
- 411. Payment by negotiable instrument.
- 412. Payment in forged or worthless notes or counterfeit coin.
- 413. Sending money by post.
- 414. Effect of giving receipt.
- 415. Appropriation of payments.

(c) Tender.

- 416. Tender when a discharge.
- 417. Requisites of valid tender.
- 418. When tender not necessary.

§ 404. **Introductory.**— A contract may be discharged by performance in accordance with its terms. Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract; all has been done on both sides that could be required to be done under the contract. But, where one promise is given in consideration of another, performance by one party does not necessarily discharge the contract, though it discharges him who has performed his part from doing more. Each must have done his part in order that performance may operate as a discharge of both. Per-

formance of a contract for the delivery of money only is called Payment.¹

(a) *Performance.*

§ 405. *Performance Must Follow Terms of Contract.* — By the common-law rule, to discharge a promise by performance, the performance must be in strict accordance with the terms of the contract.² A contract for the sale of chattels can only be performed by the delivery of the exact quantity contracted for,³ of the quality bargained for, in the mode specified in the contract, and at the place agreed upon.⁴

§ 406. *Rule in Equity.* — But in equity it has always been held that where the contract is substantially performed, the party may recover as for a complete performance less such damages as the other party may have suffered on account of the failure to make complete performance, and the equity rule has been generally adopted in the code States.⁵

¹ See *post*, § 410.

² *Farrar v. Nightingale*, 2 Esp. 639; *Duffell v. Wilson*, 1 Camp. 407; *Dauchy v. Drake*, 85 N. Y. 407; *Hill v. School Dist.*, 17 Me. 316; *Norris v. School Dist.*, 13 Me. 236; 23 Am. Dec. 182; *Allen v. Cooper*, 22 Mo. 136; *Smith v. Davis*, 1 Wis. 447; 60 Am. Dec. 391; *Leonard v. Dyer*, 28 Conn. 173; 68 Am. Dec. 382; *Superintendent v. Bennett*, 27 N. J. (L.) 513; 73 Am. Dec. 373; *Dula v. Cowles*, 7 Jones, 290; 75 Am. Dec. 463; *Derrickson v. Edwards*, 29 N. J. (L.) 463; 80 Am. Dec. 290; *Leopold v. Salkey*, 89 Ill. 412; 31 Am. Rep. 93; *Newmarket Iron Foundry v. Harvey*, 23 N. H. 835; *Lowdry v. Cooper*, 21 Ind. 269; *Davenport v. Wheeler*, 7 Cow. 231; *King Philip Mills v. Slater*, 12 R. I. 82; 34 Am. Rep. 603; *Filley v. Pope*, 115 U. S. 213.

³ *Downer v. Thompson*, 2 Hill, 137; *Dennett v. Short*, 7 Greenlf. 150; 20 Am. Dec. 356; *Roberts v. Beatty*, 2 Penr. & W. 63; 21 Am. Dec. 410; *Stevenson v. Bingle*, 49 Pa. St. 36. Sometimes the

quantity of goods to be delivered is expressed with the addition of "about," "more or less," etc., which gives to the seller some reasonable limits of allowance in the performance of his contract, according to the circumstances of each case. *Day v. Cross*, 59 Tex. 595; *Swepson v. Summery*, 64 N. C. 293; *Holland v. Rea*, 48 Mich. 218; *Cabot v. Winsor*, 1 Allen, 546.

⁴ *Savage Manfg. Co. v. Armstrong*, 19 Me. 147; *Clark v. Cuson*, 3 Head. 55; *Krafts v. Hurz*, 11 Mo. 109.

⁵ *Patterson v. Judd*, 27 Mo. 563; *Houston v. Meyer*, 5 Blackf. 89; *Goldsmith v. Hand*, 26 Ohio St. 101; *Phillip v. Gallant*, 62 N. Y. 264; *Nolan v. Whitney*, 88 N. Y. 648; *Johnson v. De Peyster*, 50 N. Y. 666; *Glaciux v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Wolfe v. Howe*, 20 N. Y. 197; 75 Am. Dec. 500; *Hayward v. Leonard*, 7 Pick. 181; 29 Am. Dec. 269; *Porter v. Woods*, 3 Humph. 56; 39 Am. Dec. 153; *Gleason v. Smith*, 9

§ 407. **Time of Performance.** — At law, "time was always of the essence of the contract." If A made a promise to B whereby he undertook to do a certain thing by a certain day in consideration that B would thereupon do something for him, B was discharged from his promise if, by the date named in the contract, A's promise was unfulfilled. And if B's part of the contract had been executed A's performance made after the time stipulated was not performance in the eye of the law but a satisfaction for the breach which had taken place.¹ Unless the contract so stipulates, time is not deemed to be of its essence.² But generally, in a contract for certain work, the specified time is as much the essence of the contract as is the manner of the performance.³ Where the performance is to be on a certain day, the party has the whole of that day to do it in.⁴ So where it is to be within a specified time, the party bound has until the last moment of the last day.⁵

Where there is no time fixed by the contract, the law implies that the performance is to take place within a reasonable time.⁶

§ 408. **Rule in Equity.** — Equity, however, looks further into the intention of the parties, so as to ascertain

Oush. 484; 57 Am. Dec. 62; Hovey v. Pitcher, 13 Mo. 191; Chambers v. Jaynes, 4 Pa. St. 39; Rees v. Smith, 1 Ohio, 124; 13 Am. Dec. 599; Meineke v. Falk, 61 Wis. 623; 50 Am. Rep. 157.

¹ Leake Contr. 834; Dermott v. Jones, 23 How. 220.

² Kirchoff v. Voss, 67 Tex. 320; Watson v. Walker, 67 Tex. 651.

³ Nesbitt v. Pearson, 33 Ala. 668; Warren v. Bean, 6 Wis. 120; Rouse v. Lewis, 4 Abb. App. 121.

⁴ Leake Contr. 834.

⁵ Curtis v. Blair, 26 Miss. 309; 59 Am. Dec. 257; Startup v. Macdonald, 6 Man. & G. 593.

⁶ Atwood v. Clarke, 2 Me. 249; Morse v. Bellows, 7 N. H. 549; 28 Am. Dec. 372; Minn. Gas Light Co. v. Mfg. Co., 122 U. S. 200; Palmer v. Breen, 34 Minn. 39; Warren v. Wheeler, 8 Met. 97; Wis-

wall v. McGowan, 1 Hoff. Ch. 125; Roberts v. Beatty, 2 Pa. St. 63; 21 Am. Dec. 410; Butler v. O'Hear, 1 Desaus. 382; 1 Am. Dec. 671; Atwood v. Cobb, 16 Pick. 297; 26 Am. Dec. 657; Phillips v. Morrison, 3 Bibb, 105; 6 Am. Dec. 688; Ellis v. Thompson, 3 Mees. & W. 445; Clark v. Remington, 11 Met. 361; Startup v. Macdonald, 6 Man. & G. 593; Hales v. R. R. Co., 4 Best & S. 66; Graves v. Ashlin, 3 Camp. 426; Adams v. Adams, 26 Ala. 272; Luckhart v. Ogden, 30 Cal. 547; Wright v. Maxwell, 9 Ind. 192; Waterman v. Dutton, 6 Wis. 265; Cocker v. Franklin, 3 Sum. 530; Watts v. Sheppard, 2 Ala. 425; Sawyer v. Hammett, 15 Me. 40; Little v. Hobbs, 34 Me. 387; Howe v. Huntington, 15 Me. 350; Atkinson v. Brown, 20 Me. 67; Lindsey v. Police Jury, 16 La. Ann. 389.

whether in fact the performance of the contract was meant to depend upon A's promise being fulfilled to the day, or whether a day was named in order to secure performance within a reasonable time. If the latter is found to be the intention of the parties, equity will not refuse to A the enforcement of B's promise if his own was performed within a reasonable time.¹ But while equity will not regard the time specified as of the essence of the contract, still the parties by express agreement may make it so, and in case they do, equity will not relieve the party in default.²

§ 409. **Performance of Conditional Promises.**—A promise may be conditional, *i. e.*, where the performance is not due immediately, but becomes so only after the happening of a future event. In such cases the condition precedent must take place before the party can be in default for not performing his promise.³ For example:

(a) The promise may be conditioned to be executed at a future time, and here the specified time must elapse before performance can become due.⁴

(b) The promise may be conditional upon the happening of some event or contingency which is altogether uncertain; as (for illustrations) a contract to purchase, "provided

¹ *Andrews v. Sullivan*, 2 Gilm. 327; 42 Am. Dec. 53; *Steele v. Branch*, 40 Cal. 3; *Bull ok v. Adams*, 20 N. J. (Eq.) 367; *Edgerton v. Peckham*, 11 Paige, 352; *Taylor v. Baldwin*, 27 Ga. 438; 73 Am. Dec. 736; *Walker v. Owens*, 25 Mo. App. 587; *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; *Jones v. Robbins*, 29 Me. 351; 50 Am. Dec. 593.

² *Reed v. Braden*, 61 Pa. St. 460; *Bullock v. Adams*, 5 C. E. Greene, 371; *Scott v. Felds*, 7 Ohio, 90; *Morgan v. Bergen*, 3 Neb. 209; *Grogg v. Ladis*, 21 N. J. (Eq.) 494; *Kemp v. Humphrey*, 36 Ill. 33; *Wells v. Smith*, 7 Paige, 22; 31 Am. Dec. 274; *Shinn v. Roberts*, 20 N. J. (L.) 435; 43 Am. Dec. 636; *Missouri, etc., R. R. Co. v. Brinckley*, 21 Kan. 275; *Kimball v. Toole*, 70 Ill. 553; *Reynolds v. R. R.*

Co., 11 Neb. 186; *Knott v. Stephens*, 5 Or. 335; *Kirby v. Harrison*, 2 Ohio St. 326; 59 Am. Dec. 677; *Davis v. Stevens*, 3 Iowa, 158; *Mason v. Payne*, 47 Mo. 517; *Jennisons v. Leonard*, 21 Wall. 303; *Phelps v. R. R. Co.*, 63 Ill. 468; *Grey v. Tubbs*, 43 Cal. 359; *Barnard v. Lee*, 97 Mass. 92.

³ *Barry v. Alsbury*, 6 Litt. 151; *Balt., etc., R. Co. v. Polly*, 14 Gratt. 447; *Elldridge v. Rowe*, 2 Gilm. 91; 42 Am. Dec. 41; *Oakley v. Morton*, 11 N. Y. 26; 62 Am. Dec. 49; *Wayne, etc., Institute v. Smith*, 37 Barb. 576; *Galt v. Swain*, 9 Gratt. 633; 60 Am. Dec. 311; *Bruce v. Snow*, 20 N. H. 484; *Vanhorne v. Dorrance*, 2 Dall.

⁴ *Cleveland v. Sterrett*, 70 Pa. St. 204.

titles can be procured and made;''¹ or a subscription to a purpose, provided a certain further sum is subscribed,² or a promise to pay money provided it is realized out of a certain specified fund.³

(c) The promise may be conditional upon the act or will of a third party.⁴ Thus, where a building contract provides that payment shall only be made on the certificate of approval of the architect, no claim for payment can be made unless the certificate be given.⁵ In the absence of fraud, or such gross mistake as is equivalent to bad faith, or a failure to exercise an honest judgment in refusing the certificate, the refusal is conclusive against the builder's right to claim the stipulated compensation.⁶ So, where quantity or price or quality, it is agreed by the parties, is to be left to the opinion and determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake.⁷

(d) The promise may be conditional on the will of the promisor. In most cases of this character there is no binding contract at all; as, for example, an agreement to do a certain thing if the promisor sees fit, or to pay a person what he thinks is right.⁸ Nearly akin to these are promises to pay for work or chattels on condition that they are satisfactory to the promisor.⁹ Though generally this discretion must be exercised in good faith and not in an arbitrary or capricious manner,¹⁰ yet if the clear meaning of the agree-

¹ *Lacy v. Hall*, 37 Pa. St. 360.

² *New York, etc., R. Co. v. DeWolf*, 31 N. Y.

³ *Rogers v. Law*, 1 Black, 253; *Staats v. Hodges*, Hill & D. 211.

⁴ *Cutley v. Hardenberg*, 1 Denio, 508; *Wyckoff v. Meyers*, 44 N. Y. 143.

⁵ *Morgan v. Birnie*, 9 Bing. 673; *Clarke v. Watson*, 18 Com. B. (N. S.) 278; *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442.

⁶ *Sweeney v. U. S.*, 109 U. S. 618.

⁷ *Keeble v. Black*, 4 Tex. 69; *Baasen v. Blake*, 7 Wis. 576; *Nofsinger v. Ring*,

71 Mo. 149; 36 Am. Rep. 456; *O'Reilly v. Kerns*, 52 Pa. St. 214; *Crane v. Roberts*, 5 Me. 419; *Dustan v. Andrew*, 44 N. Y. 72; *Vaughan v. Howe*, 20 Wis. 497.

⁸ *Tolmie v. Dean*, 1 Wash. 57; *Rosher v. Williams*, L. R. 20 (Eq.) 290; *Savage Manfg. Co. v. Armstrong*, 19 Md. 147.

⁹ *Phelps v. Willard*, 16 Pick. 29.

¹⁰ *McClure v. Briggs*, 58 Vt. 83; *Hartford, etc., Manfg. Co. v. Brush*, 43 Vt. 528; *Duplex Safety Co. v. Garden*, 101 N. Y. 387; 54 Am. Rep. 709; *Pope v. Iron Co.*, 14 Mo. App. 502.

ment is that the satisfaction or approval shall be quite arbitrary, then the only restriction upon the approval is that it must be exercised in good faith, and not merely for the purpose of defeating the contract, no matter how unreasonably or capriciously.¹ Thus, where an artist agrees to make a portrait which shall be satisfactory to the person ordering it, neither the artist nor the jury can decide that the person ordering the portrait ought to be satisfied with it.²

In *Brown v. Foster*,³ the plaintiff, a tailor, had agreed to make the defendant a suit of clothes to his satisfaction. When the clothes were delivered he was not satisfied with them and returned them, refusing even to allow the plaintiff to alter them so as to make them fit. In an action for their price, the plaintiff proved by other tailors that the clothes were, barring a slight defect which could be easily remedied, well made. But the court held that this did not matter. "If," said Devens, J., "the plaintiff saw fit to do work upon articles for the defendant, and to furnish materials therefor, contracting that the articles, when manufactured, should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot

¹ *Exhaust Ventilator Co. v. R. R. Co.*, 66 Wis. 218; 54 Am. Rep. 717; *Moore v. Goodman*, 43 Hun, 534; *Singerly v. Thayer*, 106 Pa. St. 291; 54 Am. Rep. 715; *Averett v. Lipscombe*, 76 Va. 404; *Andrews v. Belfield*, 2 Com. B. (N. S.) 779; *Stadhardt v. Lee*, 3 Best & S. 364; *Harden*

v. Commrs. 97 Ind. 455; *Goodrich v. Van Nortwick*, 43 Ill. 445; *McCarren v. McNulty*, 7 Gray, 139.

² *Moore v. Goodman*, 43 Hun, 534; *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446.

³ 113 Mass. 136.

be relieved from the contract into which he has voluntarily entered."

(e) The promise may be conditional upon a request or demand of performance; the making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract, must be alleged and proved.¹ Unless otherwise provided the demand need not be in writing.²

(f) The promise may be conditional upon notice of some matter being given to the promisor, in which case the required notice is as requisite as the demand in the last case.³ And even when not expressly stipulated for, the requirement of notice may be implied from the nature of the transaction, as where the matter lies peculiarly within the knowledge of the other party.⁴

(b) *Payment.*

§ 410. **Non-payment of Debt When Due.**—Payment is the performance of a contract for the delivery of money. A contract to pay money is discharged by the payment or the tender of either money or a negotiable instrument at the time and in the manner provided by the contract. A party relying on or pleading payment must prove it, as it is a defense peculiarly within his knowledge.⁵

A debtor is entitled to be satisfied of the authority of a person demanding payment before complying with the demand, and a refusal upon that specific ground is justifiable;⁶ but the possession of a signed receipt is sufficient evidence of the authority.⁷

¹ *West v. Murph.*, 3 Hill, 284; *Baker v. Stoughton*, 1 Or. 227; *Stevens v. Adams*, 45 Mo. 611; *Lobdell v. Hopkins*, 5 Cow. 516; *Greenwood v. Curtis*, 6 Mass. 355; 4 Am. Dec. 145; *Mitchell v. Gregory*, 1 Bibb, 449; 4 Am. Dec. 655; *Benners v. Howard*, Tayl. 149; 1 Am. Dec. 583.

² *Colby v. Reed*, 99 U. S. 560.

³ *Quarles v. George*, 22 Pick. 400; *Johnson v. Moore*, 1 Blackf. 253.

⁴ *Vyse v. Wakefield*, 6 M. & W. 453; *Makin v. Watkinson*, L. R. 6 Ex. 25; *Birdseye v. Davis*, 2 McCord, 296.

⁵ *Wolfe v. Hall*, 62 Ala. 24.

⁶ *Nash v. Union Mut. Ins. Co.*, 43 Me. 343; 69 Am. Dec. 65.

⁷ *Nash v. Union Mut. Ins. Co.*, 43 Me. 343; 69 Am. Dec. 65.

If the payment is not made at the proper time, the creditor has a claim against the debtor for damages for the breach of the contract. These damages are, as a rule, merely "nominal," but they give the creditor a right of action. If the creditor, before commencing an action, accepts the amount of his debt in satisfaction, he cannot afterwards sue for the merely nominal damages for the detention. But it is otherwise when the payment is made after an action has been commenced.¹ And payment of a less sum than due, even though accepted by the creditor in full, is not, as we have seen, a discharge of the residue.²

§ 411. *Payment by Negotiable Instrument.*—Where payment is made in a bill or note, two different cases may arise. The creditor may take the security, and promise, in consideration of it, expressly or impliedly, to discharge his debtor altogether from his existing liabilities. He then relies upon his rights conferred by the instrument, and if it be dishonored at maturity must sue on it and cannot revert to his original cause of action.³

Or the note may be accepted without that agreement. Here, as in the last case, the remedy on the original debt is suspended until the maturity of the note,⁴ but, if the note is not then paid the original debt is revived⁵—provided the creditor has not been guilty of any laches or want of diligence in obtaining payment of the note.⁶

The presumption is (nothing been shown to the contrary) that the parties intended the taking of the note to operate

¹ Lawson Rights, Rem. & Pr., § 2535.

² *Ante*, § 104.

³ Wolf v. Fink, 1 Pa. St. 435; 44 Am. Dec. 141; Balston v. Wood, 15 Ill. 159; 58 Am. Dec. 604; Oostar v. Davis, 8 Ark. 213; 46 Am. Dec. 311.

⁴ Glenn v. Smith, 3 Gill & J. 436; 20 Am. Dec. 452; Happy v. Master, 48 N. Y. 313. The rule extends also to checks. Briggs v. Holmes, 118 Pa. St. 283; 4 Am.

St. Rep. 597; Barnet v. Smith, 30 N. H. 256; 64 Am. Dec. 290; Heartt v. Rhodes, 66 Ill. 351; Wells v. Morrison, 91 Ind. 51.

⁵ Winsted Bk. v. Webb, 39 N. Y. 825; 100 Am. Dec. 435; Mudd v. Harper, 1 Md. 110; 54 Am. Dec. 644.

⁶ Cochran v. Wheeler, 7 N. H. 302; 26 Am. Dec. 732; Stevens v. Park, 73 Ill. 307; Phoenix Ins. Co. v. Allen, 11 Mich. 501.

as a conditional discharge only;¹ though, in a few States, this doctrine is denied and a negotiable instrument received for an indebtedness is regarded as an absolute payment, unless a contrary intention is shown.² In some States it is held that if the note be that of a third person, and not of the debtor, satisfaction is presumed.³ And it is generally held that satisfaction, and not merely conditional payment, is intended when the note of a third person is given without guaranty or indorsement, or is indorsed "without recourse" for a debt contracted at the time, as where a note of a third person is transferred by mere delivery or is indorsed without recourse for the price of goods sold at the time. Such a transaction is considered a barter or exchange of the note for the goods.⁴

§ 412. *Payment in Forged or Worthless Notes or Counterfeit Coin.*—A payment innocently made in worthless or counterfeit bank bills or coin is no payment.⁵

¹ *Nightengale v. Chaffee*, 12 R. I. 609; 23 Am. Rep. 531; *Jaffrey v. Cornish*, 10 N. H. 506; *Thomas v. Kelley*, 3 Rich. (N. S.) 210; 16 Am. Rep. 716; *Patapsco Ins. Co. v. Smith*, 6 Har. & J. 166; 14 Am. Dec. 268; *Olopper v. Union Bank*, 7 Har. & J. 92; 16 Am. Dec. 294; *Folk v. Wilson*, 31 Md. 551; 83 Am. Dec. 599; *In re Davis*, 5 Whart. 530; 84 Am. Dec. 574; *Moses v. Trice*, 21 Gratt. 556; 8 Am. Rep. 609; *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709; *Matteson v. Ellsworth*, 33 Wis. 502; 14 Am. Rep. 766; *Weymouth v. Sanborn*, 43 N. H. 171; 80 Am. Dec. 144; *Crary v. Bowers*, 20 Cal. 85; *Caldwell v. Hall*, 49 Ark. 568; 4 Am. St. Rep. 64; *Walsh v. Lennon*, 98 Ill. 27; *McGuire v. Bidwell*, 64 Tex. 48; *Emerson v. O'Brien*, 36 Ohio St. 491; *Alkin v. Peterson*, 45 Ark. 313; *Case v. Sears*, 44 Mich. 196. Though there are numerous cases in New York sustaining this rule, yet there are also cases which hold that a note given for a pre-existing debt is not presumed to be a payment thereof; but where the note is given contemporaneously with the debt it is. *Noel v. Murray*,

13 N. Y. 167; *Whitbeck v. Van Ness*, 11 Johns. 409; 6 Am. Dec. 383.

² This is the rule in Maine, Massachusetts, Indiana and Vermont. *Palne v. Dwinell*, 53 Me. 52; *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282; *Thacher v. Dinsmore*, 5 Mass. 299; 4 Am. Dec. 61; *Farham v. Brock*, 113 Mass. 195; *Maneely v. McGee*, 6 Mass. 143; 4 Am. Dec. 106; *Melledge v. Iron Co.*, 5 Cush. 158; 51 Am. Dec. 57; *Dodge v. Emerson*, 131 Mass. 467; *Smith v. Bettgar*, 68 Ind. 234; *Hutchins v. Olcott*, 4 Vt. 549; 34 Am. Dec. 634; *Walt v. Brewster*, 31 Vt. 516.

³ *Wright v. Crockery Ware Co.*, 1 N. H. 281; 8 Am. Dec. 68; *Whitney v. Gow*, 20 N. H. 354; *Smith v. Bettgar*, 68 Ind. 254; 34 Am. Rep. 256; *Stafford v. Bacon*, 1 Hill, 532; 37 Am. Dec. 366; *Gibson v. Tobey*, 46 N. Y. 637; 7 Am. Rep. 397.

⁴ *Benj. Prin. Contr.* 121, citing *Whitbeck v. Van Ness*, 11 Johns. 414; 6 Am. Dec. 167; *Breen v. Cook*, 11 Johns. 241; *Noel v. Murray*, 13 N. Y. 167.

⁵ *Markle v. Hatfield*, 2 Johns. 455; 3 Am. Dec. 446; *United States v. Morgan*, 11 How. 164; *Gilman v. Peck*, 11 Vt. 516;

Nevertheless, the law requires that after the detection of the counterfeit character of the money, whether coin or bank notes, there shall be no negligence or want of diligence on the part of the creditor who receives it in giving information to the payer of the true character of the money, and in returning it to him. For, if he is promptly notified he may be able to ascertain from whom he received it, and to trace it back from holder to holder till it shall be returned either to the original forger, or to him who passed it knowing it to be counterfeit.¹ Therefore, where the creditor did not return the counterfeit money in one case until six months,² in another until two months,³ in another until ten days⁴ after he had received it, the court held that his delay estopped him from recovery against the debtor.

So, if a bill or note or check is invalid for any reason or worthless by reason of the insolvency of the maker the creditor may repudiate the payment.⁵

The bills of an insolvent bank are no satisfaction of the debt, though at the time of payment neither party was aware that the bank had failed.⁶ But the loss falls

34 Am. Dec. 702; *Watson v. Cresap*, 1 B. Mon. 125; 46 Am. Dec. 573; *Young v. Adams*, 6 Mass. 182; *Mudd v. Reeves*, 2 Har. & J. 368; *Ramsdale v. Horton*, 3 Pa. St. 330; *Blalock v. Phillips*, 28 Ga. 216; *Bank v. Buchanan*, 87 Tenn. 32; 10 Am. St. Rep. 617.

¹ *Simms v. Clark*, 11 Ill. 137; *Union Nat. Bank v. Baldenwick*, 45 Ill. 374; *Pindall v. Bank*, 7 Leigh, 617; *Thomas v. Todd*, 6 Hill, 340; *Orudner v. Pinnock*, 14 Serg. & R. 56; *Atwood v. Cornwall*, 23 Mich. 336; 15 Am. Rep. 219; *Widgate v. Neidlinger*, 50 Ind. 530; *Samuels v. King*, 50 Ind. 527; *Laurenceburg Nat. Bank v. Stevenson*, 51 Ind. 594.

² *Raymond v. Baar*, 13 Serg. & R. 318; 15 Am. Dec. 603; *Rick v. Kelly*, 30 Pa. St. 330.

³ *Pindall v. Bank*, 7 Leigh, 617.

⁴ *Thomas v. Todd*, 6 Hill, 340.

⁵ *Markle v. Hatfield*, 2 Johns. 455; 3

Am. Dec. 446; *Fleig v. Sleet*, 43 Ohio St. 53; 54 Am. Rep. 300; *Bank v. Smith*, 5 Conn. 71; 13 Am. Dec. 37; *Roberts v. Fisher*, 43 N. Y. 159; 3 Am. Rep. 690; *Hussey v. Sibley*, 64 Me. 192; 23 Am. Rep. 537.

⁶ *Fagg v. Sawyer*, 9 N. H. 365; *Wainwright v. Webster*, 11 Vt. 576; 34 Am. Dec. 707; *Gilman v. Peck*, 11 Vt. 516; 34 Am. Dec. 702; *Ontario Bk. v. Lightbody*, 13 Wend. 101; 27 Am. Dec. 179; *Westfall v. Braley*, 10 Ohio St. 183; 75 Am. Dec. 509; *Scruggs v. Gass*, 5 Yerg. 175; 29 Am. Dec. 114; *Frontier Bk. v. Morse*, 23 Me. 83; 23 Am. Dec. 284; *Magee v. Carmack*, 13 Ill. 289; *Harley v. Thornton* 2 Hill (S. C.), 503; *Townsend v. Bank*, 7 Wis. 195; *Honore v. Comesnil*, 1 J. J. Marsh. 523; *White v. Guthrie*, 1 J. J. Marsh. 503. *Contra*, *Bayard v. Skunk*, 1 Watts & S. 92; 37 Am. Dec. 441; *Edmunds v. Digges*, 1 Gratt. 359; 43 Am. Dec. 561;

upon the receiver, where the bank suspends payment immediately after payment.¹ And a payment of a debt due a bank in its own depreciated bank notes is good.²

§ 413. *Sending Money by Post.* — To absolve a debtor who transmits money by mail to his creditor for the payment of his debt, from the hazard of loss in the transmission, it is necessary that the remittance should be made by the authority, express or implied, of the creditor, and in the manner and with the precautions prescribed by him. The creditor may direct the debtor to send him money by mail, or it may have been the custom between them to do so, or the creditor may direct him to simply "remit," the amount or to send the money by a registered letter. In the first two cases if the debtor send the money by mail, and it is lost in transit he is discharged,³ in the third he is not;⁴ nor in the fourth if he fails to register the letter.⁵

§ 414. *Effect of Giving Receipt.* — A written receipt of payment is *prima facie* evidence of payment against the creditor but unless it be executed with the formalities of a deed it is not conclusive, and it is competent for him to contradict or explain it, and to show that the money was not paid.⁶ The acknowledgment in a deed of the receipt of the consideration is only like any other written receipt *prima facie* evidence that the amount stated has been paid and may be rebutted by parol evidence.⁷

Ware v. Street, 2 Head, 609; 75 Am. Dec. 755; Corbit v. Bank, 2 Harr. (Del.) 335; 30 Am. Dec. 635.

¹ Ware v. Street, 2 Head, 609; 75 Am. Dec. 775.

² Northampton Bank v. Balliet, 8 Watts & S. 311; 43 Am. Dec. 297; Blount v. Windley, 48 N. O. 1; 13 Am. Rep. 616.

³ Warwick v. Noakes, Peake, 67; Burr v. Sickles, 17 Ark. 428; 65 Am. Dec. 437; Gurney v. Howe, 9 Gray, 404; 69 Am. Dec. 299; Buell v. Chapin, 99 Mass. 594; 97 Am. Dec. 58.

⁴ Gross v. Criss, 3 Gratt. 262; Burr v.

Sickles, 17 Ark. 428; 65 Am. Dec. 437. But see *contra*, Townsend v. Henry, 9 Rich. (L.) 318, where the direction was to "remit to us as soon as received."

⁵ Williams v. Carpenter, 36 Ala. 9; 76 Am. Dec. 317. And it makes no difference that the debtor was unable to register the letter.

⁶ Tobey v. Barber, 5 Johns. 68; 4 Am. Dec. 326; Muldon v. Whitlock, 1 Cow. 290; 13 Am. Dec. 533; Real Estate Bk. v. Rawdon, 5 Ark. 558.

⁷ Jackson v. McCheaney, 7 Cow. 360; 17 Am. Dec. 521; Wood v. Chapin, 13 N.

§ 415. **Appropriation of Payments.** — Where a debtor who owes several debts to the same creditor makes a partial payment to him, the question often becomes material as to which of those several debts it has discharged, and as to the right of creditor and debtor respectively to appropriate the payment to a particular one of the debts. And three rules have been established by the courts for the settlement of such disputes, viz.: —

1. The debtor, if there are several debts due from him, has the first right to say to which of them his payment shall be applied.¹ And this right is so exclusive that the creditor is bound to apply the payment as he is directed even to a debt not due in preference to one overdue. The creditor may refuse it in such a case but if he accepts it he must apply it as directed.² And his intention appropriating a payment to a particular debt may be inferred from the circumstances, although not declared in express terms by the debtor.³ As, for example, where a person pays the exact amount of one of two debts which he owes, it is presumed that he intended to appropriate the payment to that debt and not to the other one, be it larger or smaller.⁴

2. The creditor, if the payment is made without any directions expressed or implied, has the right to appropriate it to any debt due to him from the debtor,⁵ provided he

Y. 509; 67 Am. Dec. 62; *Daniels v. Moses*, 12 S. O. 130.

¹ *Mann v. Marsh*, 2 Caines, 99; *Stone v. Seymour*, 15 Wend. 19; *Seymour v. Van Slyck*, 8 Wend. 403; *Patty v. Milne*, 16 Wend. 557; 22 Wend. 558; *Champences v. Fort*, 45 Miss. 355; *Leef v. Goodwin*, Taney, 460; *Vicary v. Moore*, 2 Watts, 451; 27 Am. Dec. 323; *Pickering v. Day*, 3 Houst. 474; 96 Am. Dec. 291; *Washington, etc., Gas Co. v. Johnson*, 133 Pa. St. 526; 10 Am. St. Rep. 558.

² *Wetherell v. Joy*, 40 Me. 325; *Croft v. Lumley*, 5 El. & Bl. 680; *Smuller v. Union Canal Co.*, 37 Pa. St. 68; *Runyan v. Latham*, 5 Ired. 511.

³ *Stewart v. Keith*, 12 Pa. St. 228; *Stone v. Seymour*, 15 Wend. 19.

⁴ *Seymour v. Van Slyck*, 8 Wend. 403; *Marryatts v. White*, 2 Stark. 102.

⁵ *Brady v. Hill*, 1 Mo. 315; 18 Am. Dec. 508; *Oremer v. Higginson*, 1 Mason, 338; *Bell v. Radcliff*, 33 Ark. 645; *McLendon v. Frost*, 57 Ga. 448; *Shipsey v. Bank*, 59 N. Y. 435; *Harding v. Tift*, 75 N. Y. 461; *Bank v. Bigler*, 83 N. Y. 51; *Feldman v. Beier*, 78 N. Y. 293; *Troller v. Grant*, 2 Wend. 413; *Allen v. Culver*, 3 Denio, 234; *Van Rensselaer v. Roberts*, 5 Denio, 470; *Webb v. Dickinson*, 11 Wend. 63; *Mayor v. Patten*, 4 Oranch, 817; *Waterman v. Younger*, 49 Mo. 413; *Nuttall v. Bannin*, 5 Bush, 11; *Hargroves v. Cook*, 15 Ga. 321; *Howard v. McCall*, 21 Gratt. 205; *Haynes v. Waite*, 14 Cal. 446; *Calvert v. Carter*, 18 Md. 78; *Burke v. Albert*, 4 J. J.

exercises his right within a reasonable time.¹ But once he has made his election, and communicated it either expressly or by implication to the debtor, he will not be allowed to change it according to his interest or convenience.² The creditor's right does not extend to a payment received from a third party on account of the debtor and without his knowledge;³ nor has a third person any right to insist on a particular application of a payment.⁴

The civil law rule which requires the creditor to consult the debtor's interest in preference to his own has not been adopted in our courts.⁵ He may appropriate the payment to a claim which he could not recover by action,⁶ or a debt barred by the statute of limitations,⁷ or unenforceable under the statute of frauds;⁸ or to a debt unguaranteed in preference to one for which he holds security, or has a superior remedy;⁹ or to a purely equitable debt in preference to a legal debt.¹⁰ But he cannot appropriate it to an illegal and invalid claim;¹¹ or to a claim arising out of a transaction forbidden by statute;¹² or on a debt or liability not yet due;¹³ or to a debt in a representative capacity in preference to a personal debt.¹⁴

Marsh. 97; 30 Am. Dec. 209; *Byrnes v. Clafey*, 69 Cal. 120.

¹ *Harker v. Conrad*, 12 Serg. & R. 301; 14 Am. Dec. 691. It is said that he may make the appropriation at any time while the position of the parties remains unaltered. *Leake Contr.* 920. But certainly he could not make the appropriation after suit brought. *Haynes v. Waite*, 14 Cal. 446; *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 391.

² *Hill v. Southerland*, 1 Wash. 128; *Bank v. Meredith*, 2 Wash. 47.

³ *Leake Contr.* 920.

⁴ *Gordon v. Hobart*, 2 Story, 243.

⁵ *Logan v. Mason*, 6 W. & S. 2.

⁶ *Arnold v. Mayor*, 4 Man. & G. 600; *James v. Child*, 2 Crompt. & J. 678; *McCausland v. Ralston*, 13 Nev. 126; 28 Am. Rep. 781; *Sellick v. Munson*, 3 Aik. 150; 16 Am. Dec. 689.

⁷ *Ayer v. Hawkins*, 19 Vt. 26.

⁸ *Haynes v. Nice*, 100 Mass. 327; 1 Am. Rep. 109; *Murphy v. Webber*, 61 Me. 478.

⁹ *Peters v. Anderson*, 5 Taunt. 596; *Kirby v. Marlborough*, 3 Maule & S. 18; *Mathews v. Snitzler*, 46 Mo. 301; *Harding v. Tift*, 75 N. Y. 461; *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597.

¹⁰ *Lawson Rights, Rem. & Fr.*, § 2547; *Kidder v. Norris*, 18 N. H. 534; *Bohe v. Stickney*, 36 Ala. 435.

¹¹ *Phillips v. Moses*, 65 Me. 70; *Pickett v. Bank*, 32 Ark. 346; *McCausland v. Ralston*, 13 Nev. 126; 28 Am. Rep. 781; *Rohan v. Hanson*, 11 Cush. 44; *Greene v. Tyler*, 29 Pa. St. 361.

¹² *Phillips v. Moses*, 65 Me. 70.

¹³ *Heard v. Pulaski*, 30 Ala. 502.

¹⁴ *Fowke v. Bowle*, 4 Har. & J. 566; *Sawyer v. Tappan*, 14 N. H. 352; *Johnson v. Boone*, 2 Har. (Del.) 172; *Sneed v. Webster*, 2 A. K. Marsh. 277.

3. Where neither party has made the appropriation the rule of the common law was that the law would appropriate the payment to the oldest debt¹—another illustration of its natural antipathy to any civil law rule which in this case was to appropriate the payment to the debt most burdensome to the debtor. But this more equitable rule has found favor in many of the courts to the extent of holding that the appropriation will be made by no fixed rule, but that the law will appropriate the payment according to the justice of the particular case;² that it will apply the payment, for example, to the debt whose security is most precarious;³ to a secured in preference to a simple debt;⁴ to a certain in preference to a contingent liability;⁵ to a debt enforceable by law in preference to one not so enforceable.⁶

✓ (c) *Tender.*

§ 416. *Tender when a Discharge.*—An attempted performance which is frustrated by the act of the party to whom the performance is due is called Tender. The

¹ *Stone v. Seymour*, 15 Wend. 19; *Allen v. Culver*, 3 Denio, 284; *Dous v. Morewood*, 10 Barb. 183; *Wheeler v. Cropsey*, 5 How. Pr. 288; *Sprague v. Hazenubel*, 53 Ill. 419; *Crompton v. Pratt*, 105 Mass. 255; *Langdon v. Bowen*, 46 Vt. 512; *Fairchild v. Holly*, 10 Conn. 178; *Hunter v. Ousterbont*, 11 Barb. 33; *Miller v. Miller*, 23 Me. 22; 39 Am. Dec. 597; *Parks v. Ingram*, 22 N. H. 283; 55 Am. Dec. 153; *Hersey v. Bennett*, 28 Minn. 86; 41 Am. Rep. 271; *Hollister v. Davis*, 54 Pa. St. 508; *Goetz v. Fiel*, 26 Mo. App. 634; *Willis v. McIntyre*, 70 Tex. 34; 8 Am. St. Rep. 574; *Cremer v. Higginson*, 1 Mason, 338; *Pickering v. Day*, 2 Del. Ch. 333; 3 Houst. 474; 95 Am. Dec. 391; *Yeomans v. Heartt*, 24 Mich. 401; *Smith v. Lloyd*, 11 Leigh, 512; 37 Am. Dec. 621; *Clark v. Knight*, 31 Vt. 701.

² *White v. Trumbull*, 15 N. J. (L.) 314; 29 Am. Dec. 657; *Smith v. Lloyd*, 11 Leigh, 512; 37 Am. Dec. 671; *The Martha*, 29 Fed. Rep. 708.

³ *Field v. Holland*, 6 Cranch, 8; *Stamford Bank v. Benedict*, 15 Conn. 437; *Goetz v. Fiel*, 26 Mo. App. 634.

⁴ *Patterson v. Hall*, 9 Cow. 747; *Robinson v. Doolittle*, 12 Vt. 246; *Dawes v. Morewood*, 10 Barb. 168; *Field v. Holland*, 6 Cranch, 8; *Callagan v. Boozman*, 21 Ala. 246; *Thomas v. Kelsey*, 30 Barb. 268; *Jones v. Benedict*, 83 N. Y. 79; *Stamford Bank v. Benedict*, 15 Conn. 437; *Wright v. Wright*, 7 Daly, 55; *Langdon v. Bowen*, 46 Vt. 512; *Vance v. Monroe*, 4 Gratt. 53. But see *Lanier v. Wyman*, 5 Rob. (N. Y.) 160; *Burks v. Albert*, 4 J. J. Marsh. 97; 20 Am. Dec. 309; *Putnam v. Russell*, 17 Vt. 54; 42 Am. Dec. 478.

⁵ *Bank v. Roosevelt*, 9 Cow. 409; *Bank v. Brown*, 28 Me. 294; *Newman v. Meek*, 18 Medes & M. 531.

⁶ *Backman v. Wright*, 37 Vt. 187; 65 Am. Dec. 187; *Hall v. Clement*, 41 N. H. 169.

word is applied to an offer of performance of a promise to *do something*, and to an offer of performance of a promise to *pay something*; and a distinction in its effect in the two cases must not be overlooked.

In the first case where a promisor makes a proper offer of performance to the promisee and the offer is not accepted, the promisor is thereby discharged from liability on his promise. Thus in a contract for the sale of goods if the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.¹ The tender of them passes the title and vests the property in the other party,² and the promisor holds them thereafter as his bailee.³

But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defense to an action by the creditor, does not constitute a discharge of the debt. If the creditor will not take the money due to him when he has a right to demand it, and brings an action for it, the debtor must, in order to defend himself successfully by a plea of tender, continue always ready and willing to pay the debt.⁴ Then

¹ Mitchell v. Merrill, 2 Blackf. 67; 18 Am. Dec. 128; Lamb v. Lathrop, 13 Wend. 75; 27 Am. Dec. 174; Berry v. Nall, 54 Ala. 446; Simmons v. Green, 35 Ohio St. 104; Phelps v. Hubbard, 51 Vt. 489; Cleveland v. Sterrett, 70 Pa. St. 204.

² Barney v. Bliss, 1 D. Chlp. 399; 12 Am. Dec. 697; Dewey v. Washburn, 13 Vt. 580; Slingerland v. Morse, 8 Johns. 474; Lamb v. Lathrop, 13 Wend. 95; 27 Am. Dec. 174; Des Arts v. Leggett, 16 N. Y. 552; Bradshaw v. Davis, 12 Tex. 386.

³ Colt v. Houston, 3 Johns. Cas. 243; Garrard v. Zachariah, 1 Stew. 272; Brooklyn Bank v. De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Lamb v. Lathrop, 13 Wend. 95; 27 Am. Dec. 174; Hayden v. Demets, 53 N. Y. 431.

⁴ Pulsifer v. Shepherd, 36 Ill. 512; Webster v. Pierce, 35 Ill. 158; Mason v. Groom, 24 Ga. 211; Lockhart v. Dewees, 1 Tex. 539; Brock v. Jones, 16 Tex. 461; Cary v. Bancroft, 14 Pick. 315; 25 Am. Dec. 393; Lanier v. Trigg, 6 Smedes & M. 641; 45 Am. Dec. 293. By a subsequent demand and refusal, the benefit of the tender is lost. Rose v. Brown, Kirby, 293; 1 Am. Dec. 22; Manny v. Harris, 2 Johns. 24; 3 Am. Dec. 389. But though the debtor must keep the money safely, so as to be ready at any time to produce it, Call v. Scott, 4 Call, 403; Stow v. Russell, 36 Ill. 18; he may use it. Curtiss v. Greenbanks, 24 Vt. 538. But see Roosevelt v. Bank, 45 Barb. 579; Gray v. Angier, 62 Ga. 596. And he need not

when he is sued upon it, he can plead that he tendered, but he must also pay the money into court, and if he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, and the defendant gets judgment for his costs of defense.¹

§ 417. **Requisites of Valid Tender.**—A tender to be a valid performance to the extent just stated must be made by the debtor, his agent or one professing to act in his behalf,² and to the creditor or one authorized to receive it,³ and it must also observe exactly any special terms which the contract may contain as to time, place, and mode of payment.⁴ And the following are other legal requisites to a valid tender:—

1. It must be made in that currency which the law makes a legal tender in payment of debts. In the United States legal tender consists of the gold and silver coin of the country, the smaller coins, in small sums, and the United States treasury notes.⁵

2. It must be in the exact amount of the debt;⁶ a tender of a larger sum than is due with a request for change is not

have the identical money ready. *Coiby v. Stevens*, 38 N. H. 191; *Michigan, etc., R. R. Co. v. Dunham*, 30 Mich. 133.

¹ *Aulger v. Clay*, 109 Ill. 437; *Bissell v. Heyward*, 26 U. S. 580; *Becker v. Boon*, 61 N. Y. 317; *Cuelen v. Green*, 5 Harr. (Del.) 17; *Jarboe v. McAtee*, 7 B. Mon. 279; *Clark v. Mullenix*, 11 Ind. 533; *Brooklyn Bank v. De Grauw*, 23 Wend. 343; 35 Am. Dec. 559; *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346. A tender after suit stops the running of interest on the debt. *Raymond v. Bearnard*, 12 Johns. 274; 7 Am. Dec. 317; *Woodruff v. Trapnell*, 12 Ark. 646; *Hayes v. Thom*, 23 N. H. 336; *Cornell v. Green*, 10 Serg. & R. 14. And bars the recovery of costs accruing subsequently. *Hills v. Place*, 7 Rob. (N. Y.) 289; 43 N. Y. 530; *Carpenter v. Welsh*, 40 Vt. 251; *Stowell v. Reed*, 16 N. H. 20; 41 Am. Dec. 714; *Haughton v. Leary*, 3 Dev. & B. 21;

Murray v. Windly, 7 Ired. 201; 47 Am. Dec. 324. But it does not bar the action or extinguish the debt. *Hills v. Place*, *supra*; *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 347; *Mohn v. Stoner*, 11 Ia. 30; *Downer v. Sinclair*, 15 Vt. 495; *Haynes v. Thom*, 23 N. H. 336.

² *Brown v. Dysinger*, 1 Rawle, 406; *Kincaid v. School Dist.*, 11 Me. 188; *Mahler v. Newbaur*, 33 Cal. 163; 91 Am. Dec. 571.

³ *King v. Finch*, 60 Ind. 420; *Hornby v. Cramer*, 13 How. Pr. 490; *Jackson v. Crafts*, 18 Johns. 110; *McIniffe v. Wheelock*, 1 Gray, 600; *Oatman v. Walker*, 23 Me. 67; *Conrad v. Druids Grove*, 64 Wis. 258.

⁴ *Lawson Rights, Rem., & Pr.*, § 2530.

⁵ *Knox v. Lee*, 12 Wall. 457.

⁶ *Brandt v. R. R. Co.*, 23 Ia. 114; *Helphray v. R. R. Co.*, 29 Ia. 480; *Fridge v. State*, 3 G. & J. 103; 20 Am. Dec. 463.

a good tender; if the creditor refuses to give change and demands the exact amount.¹

3. It must be made in such a manner* that the party entitled may have an opportunity of understanding the object of the tender, and seeing that what is presented for his acceptance is really what he stipulated to have.² Therefore in the case of money it must be actually produced,³ so that the party can see it.⁴ "It is not a legal tender to say, 'Here, I am ready;' the debtor must have the money ready also."⁵ In the case of a delivery of goods, they must be so tendered as to give time and opportunity to the creditor to examine and accept them.⁶ Therefore a tender of goods is not properly made by an offer to deliver closed casks, said to contain the goods, but the contents of which are not allowed to be seen and examined.⁷

4. It must be made unconditionally,⁸ for if the tender is accompanied by a demand for a receipt, or that the creditor shall admit that this is all that is due, or that the money shall be received in full of all demands, it is not a valid tender.⁹ In the case of a non-commercial promissory note, the

¹ *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336.

² *Potts v. Plaisted*, 30 Mich. 149.

³ *Ladd v. Patton*, 1 Cranch C. C. 268; *Camp v. Simon*, 24 Ala. 126; *Englander v. Rogers*, 41 Cal. 420; *Walker v. Brown*, 13 La. Ann. 266; *Bakeman v. Pooler*, 15 Wend. 637; *Sargent v. Graham*, 5 N. H. 440; 22 Am. Dec. 469; *Liebrundt v. Myron Lodge*, 61 Ill.

⁴ *Knight v. Abbott*, 30 Vt. 577; *Behaly v. Hatch*, 1 Miss. 369; 13 Am. Dec. 570; *Jewett v. Earle*, 53 N. Y. S. C. 349.

⁵ *Murphy v. Guion*, 3 Hayw. (N. C.) 163; 3 Am. Dec. 633; *Bacon v. Smith*, 3 La. Ann. 441; 46 Am. Dec. 549; *Brown v. Holley*, 38 Vt. 574.

⁶ *Isherwood v. Whitmore*, 10 M. & W. 737; *Bates v. Bates*, 1 Miss. 401; 13 Am. Dec. 573; *Dewes v. Lockhart*, 1 Tex. 535; *Wyman v. Winslow*, 11 Me. 398; 26 Am. Dec. 542; *Hawley v. Mason*, 9 Dana, 32; 33 Am. Dec. 522.

⁷ *Isherwood v. Whitmore*, *supra*.

⁸ *Smith v. Keels*, 15 Rich. 318; *Shaw v. Sears*, 3 Kan. 343; *Pulsifer v. Shepherd*, 36 Ill. 518; *Cothran v. Scanlan*, 24 Ga. 555; *Brooklyn Bk. v. DeGrauw*, 23 Wend. 344; 35 Am. Dec. 569; *Eddy v. O'Hara*, 14 Wend. 221; *Rose v. Duncan*, 49 Ind. 269; *Brown v. Gilmore*, 8 Greenl. 107; 23 Am. Dec. 223; *Rives v. Dudley*, 3 Jones (Eq.) 126; 67 Am. Dec. 231; *Davis v. Millaudon*, 17 La. Ann. 97; 87 Am. Dec. 517.

⁹ *Thayer v. Brockett*, 12 Mass. 450; *Perkins v. Beck*, 4 Cranch C. C. 68; *Holton v. Brown*, 18 Vt. 224; 46 Am. Dec. 148; *Sanford v. Bulkley*, 80 Conn. 344; *Eckstein v. Reynolds*, 7 Ad. & E. 80; *Wood v. Hitchcock*, 20 Wend. 47; *Draper v. Hitt*, 43 Vt. 439; 5 Am. Rep. 292; *Holton v. Brown*, 18 Vt. 224; 46 Am. Dec. 149; *Brown v. Gilmore*, 8 Me. 107; 22 Am. Dec. 223.

authorities are in conflict as to whether a good tender can be made upon the condition that the note shall be surrendered, but in the case of commercial paper the authorities seem to be uniform that a tender upon condition that the paper shall be surrendered is good, because such paper might be put in circulation after payment and innocent parties become liable, which is not so with non-commercial paper; after payment by the maker it becomes harmless as against him, wherever it may go.¹ A tender, however, may be made under protest²; and an acceptance by the creditor of a tender made on condition is an acceptance of the condition.³

5. It must be maintained and kept open. In the case of chattels as long as the person making the tender continues in possession of the goods, he will be bound to deliver them on demand. And in the case of money not only must he keep the money ready, but he must if sued pay it into court.⁴

6. Defects in the tender from any of the causes above may be waived by the creditor refusing to receive the thing tendered on some other ground than that which he afterwards sets up as a defect in the tender.⁵ Thus a tender in money not legal tender is good where the creditor objects to the amount, and not to the quality, of the tender.⁶ So when the money was not produced, but the creditor objected that the amount was not sufficient;⁷ and where a receipt was demanded, but the creditor objected that a greater amount was due.⁸

§ 418. When Tender not Necessary. — A tender is not necessary where the creditor either expressly or impliedly

¹ *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668; *Wilder v. Seelye*, 8 Barb. 408; *Smith v. Rockwell*, 2 Hill, 482; *Cahon v. Bank*, 7 N. Y. 457; *Strafford v. Welch*, 59 N. H. 46.

² *Scott v. R. R. Co.*, L. R. 1 O. P. 596.

³ *Lee v. Dodd*, 20 Mo. (App.) 271.

⁴ *Ante*, p. 416.

⁵ *Whelan v. Reilly*, 61 Mo. 565; *Gould v. Banks*, 8 Wend. 563; 24 Am. Dec. 70.

⁶ *Polglass v. Oliver*, 2 Crompt. & J. 15; *Jones v. Arthur*, 8 Dowl. 442; *Ball v. Stanley*, 5 Yerg. 199; 26 Am. Dec. 263.

⁷ *Polglass v. Oliver*, 2 Crompt. & J. 15; *Thorne v. Mosher*, 30 N. J. (Eq.) 257.

⁸ *Richardson v. Jackson*, 8 Mees. & W. 298.

waives it;¹ as where he states that nothing is due him, and that he will accept nothing;² or says simply that he will not receive the money or chattels;³ or absents himself from home, or avoids the debtor, in order that a tender shall not be made to him;⁴ or expressly refuses to perform his part of the contract.⁵

¹ *Holmes v. Holmes*, 12 Barb. 137; 9 N. Y. 525; *Thorne v. Mosher*, 20 N. J. (Eq.) 553; *Haskell v. Brewer*, 11 Mo. 285.

² *Lacy v. Wilson*, 24 Mich. 479; *Sharp v. Todd*, 38 N. J. (Eq.) 334.

³ *Bellinger v. Kille*, 6 Barb. 273; *Brewer v. Fleming*, 51 Pa. St. 102; *Terrell v. Walker*, 65 N. C. 91; *Wealing v. Noonan*, 31 Miss. 599; *Hazard v. Loring*, 10

Cush. 267; *Dorsey v. Barbee*, Litt. Sel. Cas. 204; 12 Am. Dec. 236.

⁴ *Southworth v. Smith*, 7 Cush. 391; *Gilmore v. Holt*, 4 Pick. 257; *Noyes v. Clark*, 7 Paige, 179; 32 Am. Dec. 630; *Hall v. Whittier*, 10 R. I. 539.

⁵ *Skinner v. Tinker*, 24 Barb. 233; *Newcomb v. Brackett*, 16 Mass. 161; *Post v. Garrow*, 18 Neb. 632.

CHAPTER XIII.

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

SECTION 419. Introductory.

- 420. One must perform what he promises.
- 421. Obligation imposed by law and by contract distinguished.
- 422. Impossibility of performance no excuse.
- 423. Exceptions to this rule.
- 424. Same — First exception.
- 425. Same — Second exception.
- 426. Alternative promises.

§ 419. **Introductory.** — Impossibility of Performance may take place from the fact that there was not at the time the contract was made any way of carrying out the contract or from the fact that subsequent to the making of the contract circumstances have arisen which make it impossible to perform it. The first class of cases does not properly belong to this chapter and has already been touched upon. They are: (a) impossibility on the very face of the agreement or known to both parties at the time, which avoids the contract because there is no real consideration,¹ and (b) impossibility at the time of the contract not known to either party, which may avoid the contract on the ground of mistake.²

[We stop to notice one other case of impossibility at the time, *i. e.*, where the impossibility is known to one party but not to the other. Where the impossibility is known only to the promisor, he is taken to intend to bind himself absolutely.³ On the other hand where the impossibility is

¹ *Ante*, § 101; "Consideration must not be impossible."

² *Ante*, § 214.

³ A covenant to pay a sum of money

"when I collect the money on a bond on which suit is pending," is broken if there is no such bond or suit pending. *Bullock v. Pottinger*, 3 J. J. Marsh 74;

known only to the promisee, it cannot be accepted with the expectation that it will be carried out and therefore the promise is not binding.]¹

But what is to be dealt with in this chapter is impossibility arising subsequent to the formation of the contract.

§ 420. **One Must Perform what he Promises.** — The common law practically says to parties who are entering into contracts, "Don't promise what you can't perform." A man is not obliged to undertake to do a dangerous or a burdensome or an unreasonable thing, but if he does so he must carry out his agreement.² So, if he wishes to protect himself from the thing which he agrees to do turning out to be difficult or dangerous or unreasonable to do, he has full opportunity to so provide in his contract, and if he promises unconditionally he will be bound unconditionally.³

A person who sells goods agreeing to deliver them at a certain time, can not plead that contrary to his expectations he could not get the goods when or at the price he intended⁴ nor that on account of disturbances in the country

19 Am. Dec. 164. A married man promised to marry a woman who was then unaware of his being married. It was held, that he was absolutely bound by his promise. *Wild v. Harris*, 7 Com. B. 999; *Milward v. Littlewood*, 5 Ex. 775. "The promise to marry," said the court, "implies on his part that he is then capable of marrying, and he has broken that promise at the time of making it." So where by a charter-party the freighter undertook to load "with the usual dispatch of the port," which he knew he was then incapable of doing by reason of his previous engagements with other vessels that had precedence by the rules of the port, it was held, that he was absolutely bound by his contract to load and responsible for the delay. *Ashcroft v. Colliery Co.*, L. R. 9 Q. B. 540.

¹ *Leake Contr.* 692.

² "A person may undertake by agreement to do any particular act, and if it

is not reasonable, it is his own fault for entering into such a contract."

Vyse v. Wakefield, 6 M. & W. 456. Where to an action for breach of promise to marry, the defendant pleaded that after making the promise he became afflicted with a disease which rendered him incapable of marriage without danger to his life this was held no defense. *Hall v. Wright*, El. B. & E. 765.

³ *Dewey v. Alpena School Dist.*, 43 Mich. 480; 38 Am. Rep. 206; *Thourborough v. Whitacre*, 2 Ld. Raym. 1164; *Superintendent v. Bennett*, 27 N. J. (L.) 513; 73 Am. Dec. 373; *McDonald v. Gardner*, 56 Wis. 35; *Dermott v. Jones*, 3 Wall. 1; *Janes v. Scott*, 59 Pa. St. 178; 98 Am. Dec. 129.

⁴ *Phillips v. Taylor*, 49 N. Y. Sup. Ct. 318; *Gilpins v. Consequa*, Pet. C. C. 88; 3 Wash. 184; *Youqua v. Nixon*, Pet. C. C. 221.

it would be dangerous to try to deliver them.¹ So, one who agrees to do certain work cannot set up that on account of matters connected with it which he did not expect, it has become difficult or will be impossible to carry it on.² So, where a school teacher was engaged for a certain term and the directors before the end of the term closed the school on account of small-pox in the neighborhood, it was held that the fact that it was eminently dangerous to continue the school was no answer to the teacher's suit for the remainder of his salary.³ And where the plaintiff entered into an agreement to furnish a certain number of horses to the government, and before the time the horses were deliverable, the bureau of cavalry as it had a right to do adopted new regulations in regard to the inspection and acceptance of horses which the plaintiff claimed made it impossible for him to obtain horses and he abandoned his contract, this was held no justification.⁴

§ 421. **Obligation Imposed by Law and by Contract Distinguished.**—An obligation imposed by law is always reasonable, and when the law creates a duty or charge and the party is disabled from performing it without any fault in him, the law will excuse him. Thus in the case of waste (which is a damage to land or tenements while in the possession of a tenant for life or years for which he is held liable to the reversioner independent of any contract) if a house or buildings or trees be destroyed by the act of God as by storms or tempest or by rioters or public enemies, the tenant is excused.⁵ So in the case of a common carrier whom the law charges as an insurer of the property he undertakes to carry, he is excused for losses arising from the act of God or the public enemy.⁶ The reason here is

¹ *Elsey v. Stamps*, 10 Lea, 709.

² *Devlin v. New York*, 4 Duer. 337;
Sheman v. Mayor, 1 N. Y. 316; *Janes v. Scott*, *supra*.

³ *Dewey v. School Dist.*, *supra*.

⁴ *In re Smoot*, 15 Wall. 36.

⁵ *White v. Wagner*, 4 H. & J. 373; 7 Am. Dec. 674.

⁶ *Lawson Contr. Carriers*, Cap. I.

that the extraordinary responsibility is imposed on him without his consent.

But if a man expressly agrees to pay rent for premises for a certain term, and before that time, they are destroyed by the act of God or other causes beyond his control he is not discharged.¹ So, "if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."² Or if a common carrier instead of undertaking the service under his common law liability should specially agree to carry safely, he would be bound for a loss which might happen from a cause which without any contract would have excused him.³ The reason here is that if he did not wish to be liable for these things he might have provided against them in his contract. The law never creates or imposes upon any one a duty to perform what God forbids, or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law.⁴

§ 422. **Impossibility of Performance No Excuse.**—Therefore if the promisor makes the performance of his promise conditional upon its continued possibility, the promisee takes the risk, and, in the event of performance becoming impossible, the promisee must bear the loss. But if the promisor makes his promise unconditionally, he takes the risk of being held liable, even though performance should become impossible by circumstances beyond his control.⁵

¹ *Hallett v. Wylie*, 3 Johns. 44; 3 Am. Dec. 457; *Linn v. Ross*, 10 Ohio, 412; 36 Am. Dec. 95; *Laugher v. Glenn*, 37 Minn. 4. This rule, it must be noted, has been modified or abolished by statute in some States. 1 Stim. Am. St. L. 2062.

² *Ross v. Overton*, 3 Call. 309; 2 Am. Dec. 552; *Abby v. Billups*, 35 Miss. 618; 73 Am. Dec. 143; *Hoy v. Holt*, 91 Pa. St. 88; 38 Am. Rep. 659; *Scott v. Scott*, 18 Gratt. 166.

³ *Gaither v. Barnet*, 2 Brev. 488. Where

a common carrier contracted to deliver certain packages in good order and condition "unavoidable accidents only excepted," he was held liable for a loss by the public enemy. *Fish v. Chapman*, 1 Ga. 349.

⁴ *School Dist. v. Dauchy*, 25 Conn. 530; 68 Am. Dec. 371.

⁵ *The Harriman*, 9 Wall. 172; *Jones v. U. S.*, 96 U. S. 29; *Dermott v. Jones*, 2 Wall. 1; *Bunby v. Smith*, 8 Ala. (N. S.), 123; *Stephens v. Vaughan*, 4 J. J. Marsh.

In *School District v. Dauchy*,¹ defendant agreed to build and complete a school-house for plaintiff. When nearly completed, the building was struck by lightning and destroyed. The court held that the destruction of the building did not excuse defendant's non-performance of the contract.² So, where one had agreed to transport goods from New York to Independence, Mo., within twenty-six days, and failed to accomplish it in that time, it was held that the fact that a public canal on which the goods were intended to be transported a part of the distance was rendered impassable by an unusual freshet, and that this occasioned the detention, was not a legal excuse therefor.³ So, where a railroad company agreed unconditionally to make a connection for the promisee with another railroad company, non-performance was held not excused by the refusal of the latter company to permit the connection to be made.⁴

In *Jones v. St. Johns College*,⁵ the plaintiffs contracted to erect certain farm buildings according to plans and specifications furnished to them, together with any alterations or additions within specific limits which the defendants might prescribe and subject to penalties if the

206; 20 Am. Dec. 216; *Singleton v. Carroll*, 6 J. J. Marsh. 537; 22 Am. Dec. 95; *Wells v. Oalnan*, 107 Mass. 517; 9 Am. Rep. 65; *Dist. Township v. Smith*, 29 Iowa, 11; 18 Am. Rep. 39; *Bacon v. Cobb*, 45 Ill. 53; *Schwartz v. Saunders*, 46 Ill. 22; *Cassidy v. Clark*, 7 Ark. 131; *Graves v. Berdan*, 29 Barb. 101; *Cobb v. Harmon*, 29 Barb. 476; *Kein v. Tupper*, 43 How. Pr. 451; *Van Buskirk v. Roberts*, 31 N. Y. 675; *Beebe v. Johnson*, 19 Wend. 500; *School Trustees v. Bennett*, 27 N. J. (L.) 513; 73 Am. Dec. 378; *Booth v. Rolling Mill Co.*, 60 N. Y. 487; *Worthington v. Ins. Co.*, 41 Conn. 401; 19 Am. Rep. 495; *Tompkins v. Dudley*, 25 N. Y. 273; 82 Am. Dec. 349; *Stees v. Leonard*, 20 Minn. 494; *Boyle v. Agawam Canal Co.*, 23 Pick. 381; 33 Am. Dec. 749; *Oakley v. Morton*, 11 N. Y. 25; 62 Am. Dec. 49; *Harrison v. Mo. Pac. R. Co.*, 74 Mo. 371.

¹ 25 Conn. 530; 68 Am. Dec. 371.

² And see to the same effect *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137; *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 423.

³ *Harmony v. Bingham*, 12 N. Y. 99; and to the same effect *Eugster v. West*, 25 La. Ann. 119; 48 Am. Rep. 232; *Tobias v. Liesberger*, 106 N. Y. 401; 59 Am. Rep. 509.

⁴ *Railroad Co. v. Reichert*, 58 Md. 261. This is very like an English case where it was held that where A contracts to take B into a firm of which he is a member, it is no excuse for his failure to do as he agreed that he cannot obtain the consent of the other partners. *Mc-Nell v. Reed*, 9 Bing. 68.

⁵ L. R. 6 Q. B. 115.

work was not finished within a certain time. And they expressly agreed that alterations and additions were to be completed on the same conditions and in the same time as the work under the original contract unless an extension of time were specially allowed. It was held that the plaintiffs, having contracted in such terms, could not avoid the penalties for non-completion, by showing that the delay arose from alterations being ordered by the defendants which were so mixed up with the original work that it became impossible to complete the whole within the specified time.

§ 423. **Exceptions to the Rule.**—To the rule, however, there are two exceptions. First, where the performance is rendered impossible by the act of the law. Second, where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates. It would perhaps be more logical to say that these two cases are not so much exceptions to the rule stated in the last sections, as cases where the intention of the parties is presumed or inferred, though not expressed, from their peculiar situation or from the subject-matter itself.¹

¹ In *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371, the court say: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance before that time becomes unlawful. Any seeming departure from this principle of law (and there are some instances that at first view appear to be of that character) will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the

nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself; such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives the horse dies, in which case the parties are held to have contracted in view of that contingency. In these and like cases the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued, so that there would be an object and an interest in the execution of the contract."

§ 424. *Same* — *First exception*. — Where the performance becomes impossible by law, either by reason of (a) a change in the law or (b) some action by or under the authority of the government, the promisor is discharged.¹

(a) Thus, where one leased a piece of land and covenanted that only ornamental buildings should be erected on an adjacent tract retained by him, and the tract retained was subsequently taken and used for a station by a railroad company under powers given to it by the legislature, it was held that the lessor was discharged from his covenant.²

So, a covenant in the lease of a wooden building to rebuild the same in case of fire, was decided to be released by the subsequent passage of a municipal ordinance prohibiting the erection of wooden buildings in that locality.³

(b) A contract by a corporation with an individual to employ him for a stipulated time is dissolved by a dissolution of the corporation by judicial proceedings, taken by the State.⁴ So, where A agreed to pay B a certain price per bushel for hauling all coal sold by A to C, and C's business passed into the hands of a receiver, who purchased coal of A, under order of court, and employed A to haul it, it was held that B could not maintain an action against A for breach of contract.⁵

In *Hughes v. Wamsutta Mills*,⁶ in an action for wages the master set up a contract by the servant to give two weeks notice of leaving the service, which had not been given because the servant had been arrested on a charge of adultery and imprisoned. It was held that this was a valid excuse.⁷

¹ *Wade v. Mason*, 12 Gray, 335; 74 Am. Dec. 597; *Livingston v. Tompkins*, 4 Johns. Ch. 416; 8 Am. Dec. 598; *Jones v. Judd*, 4 N. Y. 411; *Baker v. Johnson*, 43 N. Y. 126; *Buffalo, etc., R. Co. v. E. R. Co.*, 111 N. Y. 182; *Semmes v. Ins. Co.*, 13 Wall. 158.

Note that "law" means the law of one's own country and not the acts or laws of a foreign country. *Leake Contr.* 718; *Barker v. Hodgson*, 3 M. & S. 267.

² *Bally v. De Crespigny*, L. R. 4 Q. B. 180.

³ *Cordes v. Miller*, 39 Mich. 581.

⁴ *People v. Globe Ins. Co.*, 91 N. Y. 174.

⁵ *Atkinson v. Schoonmaker*, 12 Mo. App. 425.

⁶ 11 Allen, 201.

⁷ It was argued for the defendant in this case that as the arrest was the result of the voluntary act of the plaintiff in committing the crime for which he

§ 425. *Same — Second Exception.* — Where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued capacity or existence of the (a) person or (b) thing to which it relates, the subsequent incapacity or perishing of the person or thing will excuse the performance.

(a) Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive or shall be capable of performing the contract.¹

In *Robinson v. Davison*,² an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who having promised to perform at a concert, was prevented from doing so by dangerous illness. This was held a good excuse, the court saying, "This is a contract to perform a service, which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that, by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent

was arrested, it should therefore not be allowed to be taken advantage of by him. But the court very properly distinguished between the proximate cause of his not giving the notice which was his arrest by the officers of the law and the remote cause which was his commission of a crime, saying: "The same argument might be used in case of inability to continue in service, occasioned by sickness, or some bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his services under a contract." The same argument was in fact used with no better result in

the later case of *K. v. Raschen*, 32 L. T. (N. S.) 88, where it was held that illness was a valid excuse for not rendering personal services under a contract, and it made no difference that the illness was caused by a venereal disease contracted through the servant's own fault.

¹ *Knight v. Bean*, 23 Me. 531; *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7; *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578; *Stewart v. Loring*, 5 Allen, 306; 81 Am. Dec. 747; *Siler v. Gray*, 86 N. C. 566; *Martin v. Hunt*, 1 Allen, 419; *Singleton v. Carroll*, 6 J. J. Marsh. 537; 23 Am. Dec. 95.

² L. R. 6 Ex. 269; and see *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 40; a similar case.

on that point, the contract must, in my judgment, be taken to have been conditional and not absolute."

Promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party, and therefore, in such cases the contract is in terms broken if the promisor die before fulfillment. Yet, it was very early determined that if the performance is personal, the executors are not liable.¹ But in these cases the only ground on which the parties or their executors can be excused from the consequence of the breach of the contract is that, from the nature of the contract, there is an implied condition of the continued existence of the life of the contractor.

But no contract which can be performed by an agent is discharged by a cause of this kind; the rule is restricted to personal contracts of the character just shown.²

(b) Where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract.³

¹ As to promises to marry, see *ante*, Cap. VIII, § 386. As to contracts of service it is well settled that where complete performance is prevented by sickness or death, the contract is not broken. *Clark v. Gilbert*, *post*; *Fuller v. Brown*, 11 Metc. 440. But the promisor is discharged, and he or his representatives may recover for the work done on a *quantum meruit*. *Jarrell v. Farris*, 6 Mo. 159; *Yerrington v. Greene*, 7 R. L. 589; 84 Am. Dec. 578; *Ryan v. Dayton*, 25 Conn. 188; 65 Am. Dec. 590; *Jennings v. Lyons*, 39 Wis. 553; *Wolf v. Howes*, 20 N. Y. 201; 75 Am. Dec. 388; *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82;

Fenton v. Clark, 11 Vt. 57; *Hubbard v. Belden*, 27 Vt. 645; *Clark v. Gilbert*, 28 N. Y. 187; 84 Am. Dec. 189; *Stewart v. Loring* 5 Allen, 306; 81 Am. Dec. 717; *Lakeman v. Pollard*, 43 Me. 463; 69 Am. Dec. 77.

² *Pollock Contr.* 378.

³ *Dexter v. Norton*, 47 N. Y. 63; 7 Am. Rep. 415; *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514; *Greene v. Linton*, 7 Port. 133; 31 Am. Dec. 707; *Powell v. R. R. Co.*, 13 Oreg. 488; *The Tornado*, 108 U. S. 342; *Ward v. Vance*, 93 Pa. St. 499; *Walker v. Tucker*, 70 Ill. 527; *Gould v. Minch*, 70 Me. 288; *Brumby v. Smith*, 3 Ala. 123; *Thompson v. Gould*,

The leading case upon this subject is *Taylor v. Caldwell*.¹ There the defendant agreed to let the plaintiff have the use of a music hall for the purpose of giving concerts upon certain days; before the days of performance arrived the music hall was destroyed by fire, and the plaintiff sued the defendant for losses arising from the consequent breach of contract. The court held that, in the absence of any express stipulation on the matter, the parties must be taken "to have contemplated the continuing existence" of the music hall "as the foundation of what was to be done;" and that therefore, "in the absence of any express or implied stipulation that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

§ 426. **Alternative Promises.** — If a person contract to do at his option one of two things, and at the time of making the contract one of them is possible and the other impossible, he must perform that which is possible.² So, if both are possible when the contract is made but one of the modes subsequently becomes impossible, he is bound to perform it in the other mode.³ Thus, a creditor who, in his receipt for a safe taken by him as collateral security, promised on payment of the debt to deliver the safe to the debtor, or its equivalent in money, was held liable for the

20 Pick. 184. In *Livingstone v. Graves*, 32 Mo. 479, the defendant, who had agreed to keep a certain bridge in repair for three years, was held not bound to rebuild it, after it had been destroyed by fire. This is perhaps an extreme case, though it may be said that the intention was that there should be a bridge in existence to repair, and that "repair"

could not be construed to mean "re-build."

¹ 3 B. & S. 826.

² *Leake Contr.* 716.

³ *State v. Worthington*, 7 Ohio, 171; *Jacquinet v. Boutron*, 19 La. Ann. 30; *contra*, *Smith v. Durell*, 16 N. H. 344; 41 Am. Dec. 783.

value thereof where, without fault on his part, it was destroyed by fire while in his possession.¹ And in no case is non-performance of a contract excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.²

¹ *Drake v. White*, 117 Mass. 10.

² *Williams v. Vanderbilt*, 28 N. Y. 217;
34 Am. Dec. 533.

CHAPTER XIV.

DISCHARGE BY OPERATION OF LAW.

SECTION 427. Introductory.

(a) *Merger.*

428. Merger described.

429. Requisites to merger.

(b) *Alteration of Written Instruments.*

430. Alteration avoids instrument.

431. Presumption as to alterations.

432. Law and fact.

433. Recovery upon original consideration.

434. Right to fill blanks in instruments.

(c) *Loss of Written Instruments.*

435. Effect of loss of written instrument.

(d) *Bankruptcy.*

436. Bankrupt law discharges obligations.

(e) *Death.*

437. Discharge of contract by death.

§ 427. Introductory.—Discharge of a contract by Operation of Law, wholly without reference to any such intention of the parties, may occur in five ways: (a) by merger, (b) by alteration of a written instrument, (c) by loss of a written instrument, (d) by bankruptcy, (e) by death.

(a) *Merger.*

§ 428. Merger Described. — Merger is an operation of law which extinguishes a right by reason of its coinciding with another right of greater legal worth in the same person.¹

¹ Rap. & L. Law Dict.; Groverman v. Dittenderfer, 11 Gill. & J. 15; Baker v. Baker, 28 N. J. L. 13; 75 Am. Dec. 243;

Wann v. McNulty, 2 Gilm. 355; 43 Am. Dec. 58.

Thus, where a judgment is recovered upon either a simple contract or a contract under seal, the remedy upon them is merged in the judgment.¹ So, where two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged, being merged in the specialty.²

The doctrine of merger applies by mere operation of law, independently of any intention of the parties, and without any express or implied agreement between them that the inferior remedy should be extinguished.³ But where the face of the security or other evidence shows that the higher security was taken only as a further or collateral security, there is no merger or extinguishment.⁴

§ 429. *Requisites to Merger.*—The requisites to a merger are:

(a) The two securities must be different in their legal operation,⁵ the one of a higher efficacy than the other.⁶ A

¹ *Wayman v. Cochrane*, 35 Ill. 152; *Runnamaker v. Oordrey*, 54 Ill. 303. But not a foreign judgment. *Eastern Tp. Bank v. Beebe*, 53 Vt. 177; 38 Am. Rep. 665; *Nat. Bank v. Peabody*, 55 Vt. 492; 45 Am. Rep. 632.

² *McDonald v. Ingraham*, 30 Mass. 389; 64 Am. Dec. 166; *Bank v. Tesson*, 1 Mo. 617; *Settle v. Davidson*, 7 Mo. 604; *Davidson v. Kelly*, 1 Md. 492; *Shaw v. Benton*, 5 Mo. 478; *Ourson v. Monteiro*, 2 Johns. 308; *McNaughton v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731; *Rhoads v. Jones*, 92 Ind. 320; *Meyers v. Hewitt*, 16 Ohio, 453; *Patterson v. Patterson*, 23 Pa. St. 464. Taking a note does not extinguish a lien. *The Charlotte v. Hammond*, 9 Mo. 58; 43 Am. Dec. 538. In Illinois a party, being liable upon a replevin bond, promised in writing to pay the amount of his liability by the next term of court, if no suit was brought on the bond, but the bond was not released. It was held, that no action would lie upon the subsequent promise, as it could not merge or destroy the higher security. *Leland v. Barry*, 69 Ill. 348.

³ *Price v. Moulton*, 10 C. B. 561.

⁴ *Van Vleet v. Jones*, 20 N. J. (L.) 340; 43 Am. Dec. 633; *Gardiner v. Hust*, 2 Rich. 601; *Yates v. Donaldson*, 5 Md. 389; 61 Am. Dec. 233; *The Betsey, Davels*, 112; *Charles v. Scott*, 1 Serg. & R. 294; *Banorjee v. Hovey*, 5 Mass. 11; 4 Am. Dec. 417; *Graves v. Allen*, 66 Tex. 589.

⁵ Though we have seen that all negotiations and agreements which precede the execution of a written contract are not admissible to explain or contradict it, as they are considered as merged in the writing (*ante*, § 372. And see *Martin v. Hamlin*, 18 Mich. 354; 100 Am. Dec. 181; *Coleman v. Hart*, 25 Ind. 256; *Ferguson v. Weatherford*, 4 J. J. Marsh. 136; *Oiler v. Gard*, 23 Ind. 110), yet this is a rule of evidence merely and not "merger" as that word is used here, for the contract in writing is of no higher nature than the oral one.

⁶ Thus a bond taken for another bond does not merge the former. *Andrews v. Smith*, 9 Wend. 53; *Weakley v. Bell*, 9 Watts, 280; 36 Am. Dec. 116; *Ladd v. Wiggins*, 35 N. H. 421; 69 Am. Dec. 551. And see *Martin v. Hamlin*, 18

second security taken in addition to one similar in character will not affect its validity¹ unless there be discharge by a substituted agreement.²

(b) The two securities must be co-extensive; that is, the new and superior security must be for the same debt and between the same parties.³

(b) *Alteration of Written Instruments.*

§ 430. *Alteration Avoids Instrument.* — If a deed or other contract in writing be altered by an addition, interlineation or erasure it is discharged,⁴ though of course the other party is not precluded from availing himself of it, further than by the difficulty of proving its original state.⁵

An alteration by a stranger, without the participation of the party interested, is called a spoliation of the instrument, not changing its legal operation, so long as the original writing remains legible.⁶

The ground of this strict rule is public policy for the protection of legal instruments from fraud and substitu-

Mich. 364; 100 Am. Dec. 181; *Hines v. Barker*, 3 Johns. 506; *Woor v. Westfall*, 21 Barb. 177; *Banorgce v. Hovey*, 5 Mass. 11; *Bill v. Porter*, 9 Conn. 30; *Speed v. Hann*, 1 T. B. Mon. 16; 15 Am. Dec. 78.

¹ A superior right is never merged in an inferior.

² Where parties make a new contract on the same subject as the old the last one is considered as a substitute for the other, though there is strictly no "merger." See *Stow v. Russell*, 36 Ill. 18; *Hargrave v. Conroy*, 19 N. J. (Eq.) 281.

³ *Whitbeck v. Wayne*, 16 N. Y. 532; *Hutchins v. Hebbard*, 34 N. Y. 24; *Norfolk Bank v. McNamara*, 3 Ex. 628; *Jones v. Johnson*, 3 Watts & S. 276; 38 Am. Dec. 760; *Day v. Seal*, 14 Johns. 404; *Davis v. Anable*, 2 Hill, 339; *Doty v. Martin*, 33 Mich. 462; *United States v. Lyman*, 1 Mason, 462.

⁴ *Angle v. Ins. Co.*, 92 U. S. 330; *Benedict v. Cowden*, 49 N. Y. 396; 10 Am. Rep. 382; *Bennhany v. Ayer*, 35 N. H. 351; *Brown v. Straw*, 6 Neb. 537; 29 Am. Rep. 369; *Davis v. Coleman*, 7 Ired. 424; *Tillou v. Ins. Co.*, 7 Barb. 564; *Den v. Wright*, 7 N. J. (L.) 175; 11 Am. Dec. 564; *Hunt v. Gray*, 35 N. J. (L.) 227; 10 Am. Rep. 232; *Smith v. Weld*, 2 Pa. St. 54; *Campbell v. McArthur*, 2 Hawks, 33; 11 Am. Dec. 738; *Bliss v. McIntyre*, 18 Vt. 466; 46 Am. Dec. 165; *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621; *Greenfield Bank v. Stowell*, 123 Mass. 196; 25 Am. Rep. 67; *Draper v. Wood*, 113 Mass. 315; 17 Am. Rep. 62; *Wait v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395; *Trigg v. Taylor*, 27 Mo. 245; 72 Am. Dec. 263; *Lammers v. White Sewing Mac. Co.*, 23 Mo. (App.) 471.

⁵ *Leake Contr.* 811; *Bledsoe v. Graves*, 5 Ill. 382; *Martin v. Ins. Co.*, 101 N. Y. 498; *Drum v. Drum*, 133 Mass. 566.

⁶ *Bridges v. Winters*, *post*.

tion. The purpose is to keep interested parties from tampering with them, by the risk of forfeiting them in case of detection.¹

The general rule is subject to the following subsidiary rules, viz.:

1. The alteration must be made by a party to the instrument or with his procuration or connivance.² It does not avoid the writing where it is made by the party's agent³ or by one in whose custody it has been left for safe-keeping.⁴

2. The alteration must be made after the execution and delivery of the instrument.⁵

3. The alteration must be made without the consent of the other party, or his subsequent ratification, or it will operate as a new agreement.⁶ This assent may of course be either express or implied. Where there are several promisors those consenting to the alteration are bound thereby, while the rest are discharged.⁷

4. The alteration must be a material one, for even though made with a fraudulent intent an immaterial alteration does not vitiate the instrument.⁸ To be a material alteration it

¹ Benj Princ. Contr. 128.

² *Bridges v. Winters*, 42 Miss. 185; 2 Am. Rep. 598; *Warring v. Smyth*, 2 Barb. Ch. 119; 47 Am. Dec. 299; *Piersol v. Grimes*, 30 Ind. 129; 95 Am. Dec. 678; *Hunt v. Gray*, 35 N. J. (L.) 227; 10 Am. Rep. 232; *Louis v. Payn*, 8 Cow. 71; 18 Am. Dec. 427; *Lee v. Alexander*, 9 B. Mon. 25; 48 Am. Dec. 413; *Lubbering v. Kohlbrecher*, 23 Mo. 596; *Ford v. Ford*, 17 Pick. 418; *Davis v. Carlisle*, 6 Ala. 707; *Crockett v. Thompson*, 5 Sneed, 342; *Nichols v. Johnson*, 10 Conn. 193; *Bigelow v. Stephens*, 35 Vt. 521; *Drum v. Drum*, 133 Mass. 568; *Condict v. Flower*, 106 Ill. 105.

³ *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 35 N. J. (L.) 227; 10 Am. Rep. 232; *Bigelow v. Stephens*, 35 Vt. 521; *Miller v. Reed*, 3 Grant Cas. 51; *Langenberger v. Kroeger*, 48 Cal. 147; 17 Am. Rep. 418; *Moore v. Ivers*, 83 Mo. 29.

⁴ *Yeager v. Musgrave*, 28 W. Va. 90.

⁵ *Britton v. Stanley*, 4 Whart. 184; *Ravises v. Alson*, 5 Ala. 296; *Hunt v.*

Gray, 35 N. J. (L.) 227; *Wickes v. Caulk* 5 H. & J. 36.

⁶ *Humphreys v. Guillow*, 13 N. H. 385; 38 Am. Dec. 499; *Bell v. Mahin*, 69 Ia. 408; *Camden Bk. v. Hall*, 14 N. J. (L.) 583; *Hills v. Barnes*, 11 N. H. 395; *Collins v. Collins*, 51 Miss. 311; 24 Am. Rep. 632; *Wooley v. Constan'*, 4 Johns. 54; 4 Am. Dec. 246; *King v. Hunt*, 13 Mo. 97; *Grimstead v. Briggs*, 4 Iowa, 559; *Penny v. Corwhite*, 18 Johns. 499; *Stiles v. Probst*, 69 Ill. 383; *Tompkins v. Corwin*, 9 Cow. 255; *Pelton v. Prescott*, 13 Iowa, 567; *Wilson v. Henderson*, 9 Smedes & M. 575; 48 Am. Dec. 716; *Jackson v. Johnson*, 67 Ga. 167; *Canon v. Grigby*, 116 Ill. 151; 56 Am. Rep. 769.

⁷ *Warring v. Williams*, 8 Pick. 322; *State v. Van Pelt*, 1 Ind. 304; *Myers v. Nell*, 84 Pa. St. 369; *Davis v. Bauer*, 41 Ohio St. 237; *Gardiner v. Harback*, 21 Ill. 129; *Prettyman v. Goodrich*, 23 Ill. 330; *Canon v. Grigby*, 116 Ill. 151.

⁸ *Robinson v. Ins. Co.*, 25 Iowa, 480;

must change in some way its meaning or its legal effect,¹ and hence an alteration is immaterial if neither the rights or interests, duties or obligations, of either of the parties are in any manner changed.²

5. It must be made with a fraudulent intent. While there are cases holding that even an innocent material alteration will vitiate the instrument,³ the better opinion now is that where an alteration is made by accident or honestly under a mistake of fact as to the rights of the parties it will not prejudice the promisee.⁴

6. The instrument must be an executory obligation. The alteration of a deed or other agreement is not retroactive; it does not affect its past operation as to anything done, or any estate, right, or title vested under it.⁵ But it ceases to have any new operation; and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire, and hence an alteration of a deed may avoid the covenants therein.⁶

7. A person may in some cases be estopped from setting up a fraudulent alteration as against a third party. For example, if the maker of a bill, note or check issues it in such a state that it may easily be altered for a larger

Moye v. Herndon, 30 Miss. 110; *Miller v. Reed*, 27 Pa. St. 246; 67 Am. Dec. 459; *Miller v. Gilliland*, 19 Pa. St. 119; *Booth v. Powers*, 56 N. Y. 22.

¹ *Nichols v. Johnson*, 10 Conn. 192; *Huntington v. Finch*, 3 Ohio St. 445; *Coburn v. Webb*, 56 Ind. 96; *Wyman v. Yeomans*, 84 Ill. 403; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Morrill v. Otis*, 12 N. H. 466; *Kountz v. Kennedy*, 63 Pa. St. 187; 3 Am. Rep. 541; *Burnham v. Aver*, 35 N. H. 351; *Bridges v. Winters*, 42 Miss. 135; 2 Am. Rep. 598.

² *Vogle v. Ripper*, 34 Ill. 100; 85 Am. Dec. 298. As to what is a material alteration in contracts and deeds generally: in bonds; in bills and notes, in insurance policies and in other instruments, see *Lawson Rights, Rem. & Pr.*, §§ 2474-2477, where a large number of the cases are collected. Where an instru-

ment is in duplicate the alteration of one copy only does not affect the contract. *Lewis v. Payne*, 8 Cow. 71; 18 Am. Dec. 427.

³ See *Lawson Rights Rem. & Pr.*, § 2474.

⁴ *Horst v. Wagner*, 43 Ia. 373; 22 Am. Rep. 255; *Rogers v. Shaw*, 59 Cal. 260; *Cochran v. Nebeker*, 48 Ind. 469; *Nickerson v. Swett*, 135 Mass. 518; *Neff v. Horner*, 63 Pa. St. 330.

⁵ *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Jackson v. Jacoby*, 9 Cow. 125; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Waring v. Smyth*, 2 Barb. Ch. 119; 47 Am. Dec. 299; *Van Horn v. Bell*, 11 Iowa, 465; 79 Am. Dec. 506.

⁶ *Chessman v. Whittemore*, 23 Pick. 231; *Kendall v. Kendall*, 12 Allen, 92; *Herrick v. Malin*, 22 Wend. 388; *Arrison v. Harmstead*, 2 Pa. St. 191.

amount he will be liable to a *bona fide* holder who has taken it for value before maturity.¹

§ 431. **Presumption as to Alterations.** — Alterations in an instrument are presumed to have been made before its execution and delivery, and the burden is on the party endeavoring to prove that it is vitiated by such alteration to show the contrary.² But where the alteration is in a different handwriting from the rest of the instrument, or in a different ink, or is in the interest of the party setting it up, or is suspicious on its face, or its execution is denied under oath, the party producing the instrument is bound to satisfactorily explain the alteration.³

§ 432. **Law and Fact.** — The question whether or not a paper has been altered is a question of fact for the jury;⁴ so is the question whether it was altered before or after its execution and delivery.⁵ But whether an alteration is a material one is a question of law for the court.⁶

§ 433. **Recovery upon Original Consideration.** — Where the instrument is altered under circumstances which do not discharge it, as shown in the foregoing rules, as where it is made innocently, though the identity of the instrument may be destroyed, the promisee may still recover upon the original consideration or debt for which it was given.⁷ Yet

¹ Yocum v. Smith, 63 Ill. 321; 14 Am. Rep. 120; Leas v. Wells, 101 Pa. St. 57; 47 Am. Rep. 699; Scotland Co. Bk. v. O'Connell, 23 Mo. App. 165; Brown v. Reed, 70 Pa. St. 370; 21 Am. Rep. 75; Rainbolt v. Eddy, 34 Ia. 440; 11 Am. Rep. 152; Hall v. Bank, 5 Dand. 258; 30 Am. Dec. 685.

² Lawson Presumptive Ev., Rule 84.

³ *Id.*, Rule 85.

⁴ Printup v. Mitchell, 17 Ga. 558; 63 Am. Dec. 258; Bliss v. McIntyre, 18 Vt. 466; 46 Am. Dec. 165; Clark v. Eckstein, 22 Pa. St. 507; 62 Am. Dec. 307.

⁵ Hunt v. Gray, 35 N. J. (L.) 227; 10 Am. Rep. 233; Bailey v. Taylor, 11 Conn. 531; 29 Am. Dec. 321.

⁶ Stephens v. Graham, 7 Serg. & R. 508; 10 Am. Dec. 485; Robinson v. Ins. Co., 25 Iowa, 430; Bowers v. Jewell, 2 N. H. 543; Steele v. Spencer, 1 Pet. 552.

⁷ Vogle v. Ripper, 34 Ill. 100; 95 Am. Dec. 298; Booth v. Powers, 56 N. Y. 22; Merrick v. Boury, 4 Ohio St. 60; Lewis v. Schenck, 18 N. J. (Eq.) 459; 90 Am. Dec. 631; Matteson v. Ellsworth, 33 Wis. 498; 14 Am. Rep. 766; State Savings Bank v. Shaffer, 9 Neb. 1; 31 Am. Rep. 394.

this will not be allowed: 1. Where the rights of third parties will be prejudiced if the plaintiff be permitted to withdraw from the position assumed by such alteration;¹ 2. Where the original consideration of the contract between the parties, upon which it is sought to recover, has been merged in the consideration of the instrument altered;² and, of course, where the instrument has been fraudulently altered so as to discharge it, there can be no recovery on the original consideration.³

§ 434. **Right to Fill Blanks in Instruments.** — Where a person, intending to enter into an obligation, signs the paper wholly in blank, or blank in certain particulars, he impliedly gives authority to the holder to fill the blanks in accordance with the general character of the instrument.⁴ Thus, where the date in a bill of exchange is left blank,⁵ or the time of payment,⁶ or the place of payment,⁷ authority is implied to fill them.

A paper intended for a deed which has nothing but the signatures and the seals cannot, after its delivery, be filled up so as to make it a good deed.⁸ But where the deed is substantially made, and it is put in the hands of an agent

¹ *Alderson v. Langdale*, 3 B. & Ad. 690.

² *Whitmar v. Frye*, 10 Mo. 348; *Waring v. Smith*, 2 Barb. Ch. 119; *Mills v. Starr*, 2 Bailey, 359. See *ante*, § 428; MERGER.

³ *Kennedy v. Crandall*, 3 Lans. 1; *Smith v. Mace*, 44 N. H. 563; *Blade v. Noland*, 12 Wend. 173; 27 Am. Dec. 126; *Trow v. Glen Cove Starch Co.*, 1 Daly, 280; *Wallace v. Wallace*, 8 Ill. App. 69; *Newell v. Mayberry*, 3 Leigh, 250; 26 Am. Dec. 261.

⁴ *Bank v. McChord*, 4 Dana, 119; *Bank v. Curry*, 2 Dana, 142; *Page v. Morrell*, 3 Abb. App. 433; *Spitler v. James*, 32 Ind. 202; 2 Am. Rep. 334; *Van Duzen v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573; *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318; *Garrard v. Haddan*, 67 Pa. St. 82; 5 Am. Rep. 412; *Visher v. Webster*, 8 Cal. 100; *Angle v. Ins. Co.*, 92 U. S. 330; *Abbott v. Rose*, 62

Me. 194; 16 Am. Rep. 427; *Witte v. Williams*, 8 S. C. 290; 28 Am. Rep. 294; *Caborn v. Nebb*, 56 Ind. 96; 24 Am. Rep. 15; *Johnson Harvester Co. v. McLean*, 57 Wis. 258; 46 Am. Rep. 37.

⁵ *Mitchell v. Culver*, 7 Cow. 336; *Page v. Morrell*, 3 Abb. App. Dec. 433.

⁶ *Wilson v. Henderson*, 9 S. & M. 375; 48 Am. Dec. 716.

⁷ *Redlich v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573.

⁸ *United States v. Nelson*, 2 Brock. 64; *Ayres v. Harness*, 1 Ohio, 178; *Gilbert v. Anthony*, 1 Yerg. 69; 24 Am. Dec. 439; *Permyer v. McDaniel*, 1 Hill (S. C.), 267; 26 Am. Dec. 179; *Lockhart v. Roberts*, 3 Bibb. 361; *Sigfried v. Loran*, 6 Serg. & R. 308; 9 Am. Dec. 427; *Duncan v. Hodges*, 4 McCord, 239; 17 Am. Dec. 734; *Burns v. Lynde*, 6 Allen, 405. But see *Pierce v. Arbuckle*, 22 Minn. 417.

with certain blanks left for him to fill out, it is valid and binding after the blanks are filled.¹

(c) *Loss of Written Instruments.*

§ 435. **Effect of Loss of Written Instrument.**—At common law there could be no recovery on a lost bond, because the courts required of every instrument sued on, what was called *profert* and *oyer*; that is, the production of the writing that the defendant might hear it read in open court.² Equity, however, dispensed with this upon the party giving a bond of indemnity (a thing a court of law could not order) for the protection of the obligor if he should be made to pay it again.³ *Profert* and *Oyer* are no longer required in our courts⁴ and the loss of a written instrument only affects the rights of the parties in so far as it occasions a difficulty of proof.

But in the case of negotiable instruments, if the holder of a bill, note or check lose it, he can neither recover on it nor upon the consideration for which it was given.⁵ By the statutes of most of the States, if he offers to the party primarily liable upon the instrument indemnity against possible claims, he may recover upon it.

(d) *Bankruptcy.*

§ 436. **Bankrupt Law Discharges Obligations.**—A discharge in bankruptcy duly granted will, subject to the limitations, if any, imposed by the law, release the bank-

¹ *Duncan v. Hodges*, 4 McCord, 239; 17 Am. Dec. 734; *Texeira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 228; *Ex parte Kerwin*, 8 Cow. 118; *Field v. Stagg*, 52 Mo. 356; 14 Am. Rep. 435; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; 87 Am. Dec. 535; *Van Etta v. Everson*, 23 Wis. 37; 9 Am. Rep. 496; *Vliet v. Camp*, 18 Wis. 198; *Owen v. Perry*, 25 Iowa, 412; 96 Am. Dec. 49; *Devin v. Himer*, 29 Iowa, 299; *Clark v. Allen*, 34 Iowa, 190; *Swartz*

v. Ballou, 47 Iowa, 138; 29 Am. Rep. 470; *McNabe v. Young*, 81 Ill. 11. *Contra*, *Upton v. Archer*, 41 Cal. 85; 10 Am. Rep. 266.

² *Snell Eq.* 357.

³ *Id.*

⁴ *Fales v. Russell*, 16 Pick. 315; *Almy v. Reid*, 10 Cush. 421.

⁵ *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Ex. 604.

rupt from all obligations on contract debts and liabilities provable against his estate in bankruptcy. Thus an action for breach of a covenant in a deed is barred by the subsequent discharge in bankruptcy of the covenantor.¹ Bankruptcy also discharges, *ipso facto*, contracts of agency and service and contracts of partnership.²

(e) *Death.*

§ 437. **Discharge of Contract by Death.** — Only a very limited class of contracts are discharged by the death of the promisor, and they are those which are expressly or impliedly limited to or conditional upon the life of the promisor, as contracts to marry,³ and contracts which depend for their performance upon the personal qualities or skill of the promisor⁴ — as for example contracts of service.⁵ But the death of one of the contracting parties does not discharge his part of the agreement, where it is of such a character that it can be performed by his personal representative.⁶

Death operates as we have seen⁷ as an assignment in law of all the personal estate of the deceased to his executor or administrator, subject to the liabilities of the deceased chargeable against it.⁸

¹ Reed v. Pierce, 36 Me. 455; 58 Am. Dec. 761.

² Lawson Rights, Rem. & Pr., §§ 48, 49, 284, 671.

³ Chamberlain v. Williams, 4 M. & S. 415; Wade v. Kalbfelsch, 16 Abb. Pr. (N. S.) 104.

⁴ Wills v. Murray, 4 Ex. 886; Jarrin v. Browne, 59 Cal. 44; Shulz v. Johnson, 5 B. Mon. 497; Siler v. Gray, 86 N. C. 566; Billings's Appeal, 106 Pa. St. 558.

⁵ Yerrington v. Greene, 7 R. I. 559; 84 Am. Dec. 578; Clark v. Gilbert, 36 N. Y.

279; 84 Am. Dec. 189; Hubbard v. Beiden, 27 Vt. 645.

⁶ Hawkins v. Ball, 18 B. Mon. 816; 68 Am. Dec. 755.

⁷ *Ante*, § 366.

⁸ Hawkins v. Ball, 18 B. Mon. 816; 68 Am. Dec. 755; Brown v. Leavitt, 26 N. H. 498; Billings's Appeal, 106 Pa. St. 558; Fowler v. Kelly, 3 W. Va. 71; Pahlman v. King, 49 Ill. 286; Martin v. Hunt, 1 Allen, 418; Parnell v. James, 6 Rich. 370; Green v. Rugely, 23 Tex. 589.

CHAPTER XV.

DISCHARGE BY BREACH.

SECTION 438. Right of action and discharge caused by breach distinguished.

439. In what modes contract discharged by breach.

(a) *Discharge Before Performance Due.*

1. *By Renunciation.*

440. Breach by renunciation before time set for performance.

2. *By Impossibility.*

441. Breach by impossibility created by party.

(b) *Discharge in Course of Performance.*

1. *By Renunciation.*

442. Breach by renunciation in course of performance.

2. *By Impossibility.*

443. Breach by impossibility created by party.

§ 438. Right of Action and Discharge caused by Breach Distinguished.—If one of the parties to a contract breaks his contractual obligation, a new obligation arises in favor of the other party, viz., a right of action for the breach. And in some cases the breach will wholly discharge the injured party from performing his promise. But though every breach of the contractual obligation confers a right of action upon the injured party, every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge, or the promise of one party may be absolute and quite independent of the promise of the other. It is therefore sometimes difficult to ascer-

tain whether or not a breach of one of the terms of a contract *discharges* the party who suffers by the breach. By *discharge* is meant not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract,— the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation, a *right of action*.¹

§ 439. **In What Modes Contract Discharged by Breach.**— A contract may be discharged through its breach by one of the parties, in three modes: 1. By his renouncing his liabilities under it. 2. By his making it impossible that he can perform his promise. 3. By his totally or partially failing to perform his promise. The first two modes may take place while the contract is still wholly executory *i. e.*, before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract.

We will consider, then, in this chapter: (a) Discharge before performance is due: 1, by renunciation, and, 2, by impossibility. (b) Discharge during performance: 1, By renunciation, and, 2, by impossibility. And in the next chapter we will consider: (c) Discharge by failure to perform.

(a) *Discharge before Performance Due.*

1. *By Renunciation.*

§ 440. **Breach by Renunciation Before Time Set for Performance.**— The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time arrives. They have a right to

¹ Anson Contr, 277.

the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due. Therefore a renunciation or repudiation of a contract by one of the parties before the time for performance has come, discharges the other, if he so chooses, and entitles him to sue at once for a breach.¹

In *Hochster v. De la Tour*,² A engaged B upon the 12th of April to enter into his service as courier and to accompany him upon a tour; and the employment was to commence on the 1st of June. On the 11th of May A wrote to B to inform him that he should not require his services. B at once brought an action, although the time for performance had not arrived, and the court held that he was entitled to do so. So, in *Burtis v. Thompson*,³ it was held that an action for breach of promise would lie at once, upon a positive refusal to perform a contract of marriage, although the time specified for the performance had not arrived.⁴

A mere expression of intention not to perform is not a breach; it requires a distinct and unequivocal absolute refusal to perform the promise, which must be treated and acted upon as such by the party to whom the promise was made.⁵

Secondly. The rule does not apply to cases where the

¹ *Howard v. Daly*, 61 N. Y. 303; *Bunge v. Koop*, 48 N. Y. 236; *Ferris v. Spooner*, 102 N. Y. 10; *Crist v. Armour* 34 Barb. 387; *James v. Adams*, 16 W. Va. 267; *Holloway v. Griffith*, 33 Ia. 409; *Orabtree v. Messersmith*, 19 Ia. 179; *Fox v. Klinton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13; *Grau v. McVicker*, 8 Biss. 13; *Dingley v. Oler*, 11 Fed. Rep. 373; *McCormick v. Basal*, 46 Ia. 235; *Platt v. Brand*, 26 Mich. 175; *Hoemer v. Wilson*, 7 Mich. 304.

² 2 El. & B. 678.

³ 42 N. Y. 246.

⁴ So in an English case where A promised to marry B upon his father's

death, and during his father's life-time renounced the contract, B was held entitled to sue at once. "The promisee" said the court, "has an absolute right to the performance of the bargain, which becomes complete when the time for performance arrives. In the meantime he has the right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests." *Frost v. Knight*, L. R. 7 Ex. 114.

⁵ *Smoot's Case*, 15 Wall. 36; *Dingley v. Oler*, 117 U. S. 503; *Johnstone v. Milling*, 16 Q. B. 159; *Avery v. Bowden*, 5 El. & Bl. 714.

repudiation is only partial, as in the case of a lease containing several covenants where there is a refusal to comply with a particular covenant not going to the whole consideration.¹

Thirdly. The rule does not apply to unilateral contracts, such as promissory notes.² A man may say to the holder of the note, "I am not going to pay it." But until payment is refused when it falls due, no legal right of his has been violated by the maker.³

Fourthly. The promisee is not bound to treat the renunciation as a breach of the contract but he may insist on the performance of the contract up to the time it is due.⁴ But if he continues to treat the contract as operative, it remains in existence for the benefit and at the risk of both parties; the promisor is enabled to perform the contract, and if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge.⁵

In *Avery v. Bowden*,⁶ A agreed with B by charter-party that his ship should sail to Odessa, and there take a cargo from B's agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but B's agent refused to supply one. Although the days within which A was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. A would then have had a right to sue upon the contract. But the master of the ship continued to demand a cargo, and before the prescribed days were out — before therefore a breach by non-performance had occurred — a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards A sued for breach of the charter-

¹ *Johnstone v. Milling*, 16 Q. B. 460; *Wilson v. Phillips*, 2 Bing. 13; *Obermyer v. Nichols*, 6 Blinn. 159.

² *Burtis v. Thompson*, 42 N. Y. 246.

³ *Id.*

⁴ *Zack v. McClure*, 98 Pa. St. 541; *Kadish v. Young*, 106 Ill. 170.

⁵ *Kadish v. Young*, 106 Ill. 181; *Howard v. Daly*, 61 N. Y. 375.

⁶ 5 El. & Bl. 714.

party, but it was held that as there had been no actual failure of performance before the war broke out (for the prescribed days had not then expired), and as the renunciation of the contract had not been accepted as a breach by A's agent, B was entitled to the discharge of the contract which took place upon the declaration of war.

2. *By Impossibility.*

§ 441. **Breach by Impossibility Created by Party.**—When one of the parties, before the time for performance arrives, makes it impossible that he shall perform his promise, the other party may treat the contract as broken and bring an action immediately.¹

The right to bring the action at once without waiting for the time agreed upon for performance was sustained under this rule where A contracted with B to execute a lease to him on a future day, and before the day executed a lease to C;² where a man promised to marry a woman on a future day and before the day married another woman;³ and where a person employed an attorney to defend him against a criminal prosecution, and gave him his note for his fee

¹ Grice v. Noble, 59 Mich. 514; Hawley v. Keeler, 53 N. Y. 114; Newcomb v. Brackett, 16 Mass. 161; Heard v. Bowers, 23 Pick. 460; Wolf v. Marsh, 54 Cal. 228; Lee v. Pennington, 7 Ill. (App.) 247; Sutton v. Tyrell, 12 Vt. 79; Camp v. Barker, 21 Vt. 469; Cape Fear, etc., Co. v. Wilcox, 7 Jones, 481; 78 Am. Dec. 960; Marshall v. Craig, 1 Bibb, 379; 4 Am. Dec. 647; Kennedy v. Kennedy, 3 Bibb, 464; 5 Am. Dec. 629; Clement v. Clement, 8 N. H. 218; Lovering v. Lovering, 13 N. H. 513; Crabtree v. Messersmith, 19 Ia. 182; True v. Bryant, 32 N. H. 241; Black v. Woodrow, 39 Md. 194; Tone v. Doelger, 6 Robt. 251; Ashcroft v. Allen, 4 Ired. 96; Meyer v. Hallock, 1 Robt. 284; Hammer v. Breidenbach, 81 Me. 49; Dare v. Spencer, 3 Blackf. 491; Taylor v. Elaby, 28 Hun, 141; Majors v. Hickman, 2 Bibb, 218; Williams v. Bank of United States,

2 Pet. 102; Marshall v. Craig, 1 Bibb, 380; 4 Am. Dec. 647; Carrel v. Collins, 2 Bibb, 431; Morford v. Ambrose, 3 J. J. Marsh. 690; Crump v. Mead, 3 Mo. 233; Miller v. Ward, 2 Conn. 494; Clendenin v. Paulsel, 3 Mo. 230; 25 Am. Dec. 435; Webster v. Coffin, 14 Mass. 196; Seymour v. Bennett, 14 Mass. 268; Clark v. Moody, 17 Mass. 149; Cooper v. Mowry, 16 Mass. 7; Jones v. Walker, 13 B. Mon. 168; 56 Am. Dec. 557; Dodge v. Rogers, 9 Minn. 223. In some of these cases the impossibility arose in the course of the performance, and not before it was due, (*post*, § 443), but the principle is the same.

² Lovelock v. Franklyn, 8 Q. B. 371; Ford v. Tiley, 6 B. & C. 325.

³ Short v. Stone, 8 Q. B. 358; King v. Kersey, 3 Ind. 402; Sheahan v. Barry, 27 Mich. 217.

but committed suicide before the trial.¹ So, where one is bound to perform on demand, no demand of performance is necessary where he has incapacitated himself from performing the contract.²

(b) *Discharge in Course of Performance.*

1. *By Renunciation.*

§ 442. **Breach by Renunciation in Course of Performance.** — Where in the course of the performance one of the parties deliberately and avowedly refuses performance of his part the other may treat the renunciation as a discharge from further performance on his part, and thereupon bring an action, although such performance would otherwise be a condition precedent to the liability of the promisor.³ Thus, where a contract was made for the manufacture and supply of goods of a specified kind, to be delivered in certain quantities monthly, and the buyer after accepting a portion of the goods gave notice to the seller that he had no occasion for more and would not accept or pay for them, it was held that the seller might claim for breach of contract without manufacturing or tendering the rest of the goods.⁴

2. *By Impossibility.*

§ 443. **Breach by Impossibility Created by Party.** — In like manner, where one party has by his own act made

¹ *Mitcherson v. Dozier*, 7 J. J. Marsh. 53; 22 Am. Dec. 116.

² *Smith v. Jordan*, 13 Minn. 234; 97 Am. Dec. 232; *Delamater v. Miller*, 1 Cow. 75; 13 Am. Dec. 512; *Bassett v. Bassett*, 55 Me. 127; *Boyle v. Guysinger*, 12 Ind. 273.

³ *Dugan v. Anderson*, 38 Md. 567; *Hosmer v. Wilson*, 7 Mich. 304; *Parker v. Russell*, 133 Mass. 74; *Haines v. Tucker*, 50 N. H. 311; *Clement v. Meserole*, 107 Mass. 362; *Collins v. De La Porte*, 115 Mass. 162; *Smith v. Lewis*, 24 Conn. 624;

Davis v. Crawford, 2 Mill (S. C.) 401; 12 Am. Dec. 682; *Rankin v. Darnell*, 11 B. Mon. 30; 53 Am. Dec. 557; *Garrison v. Dingham*, 56 Ill. 150; *Brigham v. Carlisle*, 78 Ala. 243; 56 Am. Rep. 28; *Fallon v. Lawler*, 102 N. Y. 228; *Cook v. Brandeis*, 3 Met. (Ky.) 555; *Allen v. Robinson*, 2 Barb. 341; *McCormick v. Basal*, 46 Iowa, 235; *James v. Adams*, 16 W. Va. 245.

⁴ *Cort v. Ambergate R. Co.*, 17 Q. B. 127.

the contract incapable of full performance, the other may treat such act as a discharge from further performance and claim compensation for the part he has performed or the damages he has sustained.¹ This rule has been applied where a publisher engaged an author to write a treatise for a periodical, and before he had completed it abandoned the publication of the periodical;² where a lime-burner contracted with the receiver of a railroad to remove the ashes for a year from an ash-pit, for the cinders and coals to be found there, and before the expiration of the year the assistant general superintendent terminated the contract on the ground of the jealousy of other lime-burners;³ where A agreed to sell to B, at a stipulated price per ton, all the ice on a pond, and A permitted another party to remove a portion of it;⁴ where by a contract between an attorney and his client, the former agreed to defend the latter on a charge of grand larceny for five hundred dollars, but after part of the service was rendered, the client fled from justice;⁵ where on a contract for the whole produce of a dairy for the year, the seller delivered a part, and then informed the purchaser that he had sold the product for the rest of the year to another, and had delivered part thereof.⁶

¹ See cases *ante*, § 441; and *Chicago v. Tilley*, 103 U. S. 146; *Lovell v. Ins. Co.*, 111 U. S. 264; *Hawley v. Keeler*, 53 N. Y. 114; *Woolner v. Hill*, 98 N. Y. 581; *Derby v. Johnson*, 21 Vt. 17; *Shaffner v. Killian*, 7 Ill. App. 630; *Rankin v. Darnell*, 11 B. Mon. 30; 52 Am. Dec. 557;

Smith v. Rowe, 7 Colo. 26; *Moulton v. Trask*, 9 Meto. 577.

² *Planche v. Colburn*, 8 Bing. 14.

³ *Kerr v. Little*, 42 N. J. (Eq.) 578.

⁴ *Murphy v. St. Louis*, 8 Mo. App. 482.

⁵ *Bright v. Taylor*, 4 Sneed, 159.

⁶ *Crist v. Armour*, 34 Barb. 378.

CHAPTER XVI.

DISCHARGE BY BREACH (CONTINUED).

SECTION 444. Introductory — Discharge by failure to perform.

I.

INDEPENDENT PROMISES.

445. Three classes of independent promises.

(a) *Absolute Promises.*

446. Where promise absolute performance of consideration not required.

447. Independent promises not favored; concurrent promises.

(b) *Divisible Promises.*

448. Failure to perform part of divisible promises.

449. Alternative promises.

(c) *Subsidiary Promises.*

450. Subsidiary promises explained and illustrated.

II.

CONDITIONAL PROMISES.

451. The different kinds of conditional promises.

452. Suspensory and dependent conditions distinguished.

453. Dependent conditions precedent must be performed or promise discharged.

454. Condition and warranty distinguished.

455. Waiver of conditions.

§ 444. Introductory — Discharge by Failure to Perform. — In the two cases of discharge dealt with in the last chapter, one of the parties (say B), has in word or act so dealt with the contract as to intimate to the other (say A), that a further performance on his part is needless, and the courts have decided that A is not bound to tender a performance which he well knows that B will not or cannot accept. But where the breach of contract by B does not

make the contract wholly incapable of performance, or is not accompanied by any overt expression of intention to abandon his rights, the question is whether A is thereby discharged or whether he merely acquires a right of action from the breach. This can be answered only by examining the terms of the contract, and endeavoring to ascertain the intention of the parties,¹ as to whether the promises were *independent of* or *conditional upon* one another.

I.

INDEPENDENT PROMISES.

§ 445. **Three Classes of Independent Promises.**—The promise may be *independent* in three ways, viz., by being (a) absolute (b) divisible or (c) subsidiary.

(a) Where A's promise to B is *absolute*, *i. e.*, where it is wholly unconditional upon the performance by B of his promise to A, a failure of performance by B would not discharge A, but would only furnish ground for an action against B.

(b) Where the promise is *divisible*, *i. e.*, where it is susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of failure, the promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one or some of these does not discharge the promisee.

(c) Where the promise is *subsidiary*, *i. e.*, where the breach by one of the parties is a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence, the same result follows. The injured party is bound to continue his performance of the contract,

¹ Moore v. Bennet, 40 Cal. 251; Phila., Lawber v. Bargs, 2 Wall. 736; Stavers v. etc., E. Co. v. Howard, 13 How. 339; Curling, 3 Bing. N. C. 355.

but may bring an action to recover such damages as he has sustained by the default of the other.

(a) *Absolute Promises.*

§ 446. **Where Promise Absolute, Performance not Required.**—A person may make an absolute promise to perform, in such a manner that it will be no answer to an action for not performing that the other party has not performed his side of the agreement. Thus, if A makes a promise to B in consideration of a promise made by B to A, and A has not, in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon the performance of B's promise, a breach of his promise by B will not discharge A. The reason is that he has agreed to do something in consideration of B *promising* to perform something and not in consideration of B actually *performing* the thing.¹

It may be laid down generally that if there is no connection in the matter of the promises, and the performance on the one side is quite independent of the performance on the other, the promises are independent.² Where for example by the terms of the contract the time to perform the covenant on the one side is to happen, or may happen, before the time for the performance of the covenant on the other side, the former is not dependent on the latter.³ Thus, suppose that in January, 1892, A agrees to purchase land of B and covenants to pay a sum of money on the 1st of April, 1892. B covenants in turn to convey the lands to

¹ Dey v. Dox, 9 Wend. 129; 24 Am. Dec. 137; More v. Bonnet, 40 Cal. 251; Gould v. Banks, 8 Wend. 562; 24 Am. Dec. 90; Gould v. Brown, 6 Ohio St. 538; Logan v. Hodges, 6 Ala. 699; Olough v. Baker, 48 N. H. 254; Gillum v. Dennis, 4 Ind. 417; Stansbury v. Fringer, 11 Gill & J. 149.

² Cases cited in last note. Rector v. Purdy, 1 Mo. 186; 13 Am. Dec. 494.

³ Matlock v. Kinglake, 10 A. & E. 50; Dox v. Dey, 3 Wend. 366; Goodwin v. Holbrook, 4 Wend. 377; State v. Winona R. Co. 21 Minn. 474; Front Sheet R. Co. v. Butler, 50 Cal. 574; Couch v. Ingersoll, 2 Pick. 292; McCoy v. Bixbee, 6 Ohio St. 312; Sayre v. Craig, 4 Ark. 10; 37 Am. Dec. 757; Bowen v. Bailey, 42 Miss. 405; 2 Am. Rep. 801.

A, but no day is fixed for the execution of the conveyance. So soon as the 1st of April is passed, B can sue A for the money, and it is no answer to his claim that he has never conveyed, or offered to convey the land to A.¹

§ 447. **Independent Promises not Favored—Concurrent Promises.**—The courts do not favor independent promises, and the modern cases² show that they will not construe promises to be independent of one another where they form the whole consideration for one another, or it appears that they are to be performed by each party at the same time, unless the intention of the parties to the contrary be very clear, but a failure to perform one promise will exonerate the other party from performance on his part.³ Where money is to be paid for something done or delivered, it will not be presumed that the intention of the parties was that the money was to be paid or the thing done or the goods delivered without performance on the other side.⁴

Thus, in contracts for the sale of goods the obligation of the seller to deliver and that of the buyer to pay are concurrent conditions in the nature of mutual conditions precedent, and neither can enforce the contract against the other without showing performance or readiness and willingness to perform his own promise.⁵ So in contracts for service the performance of the service is a condition prece-

¹ *Matlock v. Kinglake*, *supra*.

² "The older cases," says Grose, J., in *Glazebrook v. Woodrow*, 8 T. R., "lean to construe covenants of this sort to be independent, contrary to the real sense of the parties and the true justice of the case."

³ *Marsh v. Richards*, 39 Mo. 97; *Bank of Columbia v. Hagner*, 1 Peters, 465; *Hamilton v. Thrall*, 7 Neb. 218; *Scheland v. Erpelding*, 6 Oreg. 258; *Bruce v. Crews*, 39 Ga. 544; 99 Am. Dec. 467; *Bean v. Atwater*, 4 Conn. 3; 10 Am. Dec. 91; *Greene v. Linton*, 7 Port. 133; 31 Am. Dec. 707; *Powell v. R. R. Co.*, 14 Oregon, 356; *Quigley v. DeHaas*, 82 Pa. St. 267; *Lutz v.*

Thompson, 87 N. O. 334; *Brown v. Gammon*, 14 Me. 376; *Kelly v. Webb*, 27 Tex. 368; *Nipp v. Diskey*, 81 Ind. 314; 42 Am. Rep. 124; *Clark v. Wels*, 87 Ill. 438; 29 Am. Rep. 60.

⁴ *King Philip Mills v. Slater*, 12 R. I. 88.

⁵ *Bank v. Hagner*, 1 Pet. 455; *Sargent v. Adams*, 3 Gray, 72; 63 Am. Dec. 718; *Grandy v. McCleese*, 2 Jones, 143; 64 Am. Dec. 574; *Draper v. Jones*, 11 Barb. 263; *Hough v. Rawson*, 17 Ill. 598; *Metz v. Albrecht*, 52 Ill. 491; *Smith v. Lewis*, 26 Conn. 110; *Clarke v. Wels*, 87 Ill. 438; 29 Am. Rep. 60.

dent, and the employe is not entitled to payment without rendering or offering to render the agreed service.¹ So in contracts for the sale of land, the conveyance of the estate and the payment of the purchase-money are, in general, concurrent acts and dependent promises, whether a particular day be appointed for completion or not; and readiness and willingness to complete on either side is a condition precedent to liability to complete on the other.²

(b) *Divisible Promises.*

§ 448. **Failure to Perform Part of Divisible Promises.**—Where the promises in a contract are divisible it is held by some courts that a failure of a party to perform them all does not discharge the other from his obligation. The leading case on this point is *Simpson v. Crippin*.³ A agreed with B to supply him with a given quantity of coal to be delivered in equal monthly installments for twelve months. B agreed to send wagons to receive the coal. B did not during the first month send wagons enough to receive one-twelfth of the coal. A rescinded the contract. It was held that he was not entitled to do so, inasmuch as B was willing to continue the contract as to the remaining installments, and it did not appear to have been the intention of the parties to determine the contract upon the failure of one of the parties to fulfill one of a series of terms. The principle of this case has been followed in a number of others both in England and the United States,⁴ while

¹ *McMillan v. Vanderlip*, 12 Johns. 185; *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Pick. 528; *Eldridge v. Rowe*, 8 Ill. 91; *Badgely v. Heald*, 10 Ill. 64; *Hansell v. Erickson*, 28 Ill. 257.

² *Heard v. Wadham*, 1 East, 619; *Laird v. Pim*, 7 Mees. & W. 474; *Manby v. Cremonini*, 6 Ex. 808; *Marsden v. Moore*, 4 Hurl. & N. 500; 28 L. J. Ex. 282; *Runkle v. Johnson*, 30 Ill. 323; 83 Am. Dec. 191; *Frey v. Johnson*, 22 How. Fr. 316.

³ L. R. 8 Q. B. 14.

⁴ *Mersey Steel Co. v. Naylor*, Q. B. Div. 648; 9 App. Cas. 434; *Trotter v. Hecksher*, 40 N. J. (Eq.) 656; *Blackburn v. Reilly*, 47 N. J. (L.) 808; *Lucasco Oil Co. v. Brewer*, 66 Pa. St. 351; *Scott v. Coal Co.*, 89 Pa. St. 287; *Morgan v. McKee*, 77 Pa. St. 238; *Oohea v. Platt*, 69 N. Y. 348. In *Benjamin on Sales*, § 909, it is said: "In America the law appears to be fairly settled in accordance with the decision in *Simpson v. Crippin*."

some courts refuse to follow it.¹ The doctrine of *Simpson v. Crippin*, is also followed where a sale is made, the price payable in installments, it being held that a failure to pay one installment at the agreed time does not discharge the whole contract, but the buyer, by tendering the future installments, may obtain the benefit of the sale.²

But, it seems to be agreed by all courts, that the right of rescission may be exercised on failure to perform a part or installment of the contract:

First. Where by the express terms of the contract, performance of each stipulation is made a condition precedent to the continuing obligations of the contract; or where it is evident from the nature and circumstances of the case, that the regular performance of each stipulation was an inducement to the contract, and so goes to the root of the matter as to make its performance a condition of the obligation to proceed in the contract.³

Second. Where the party in default expressly announces or his conduct is such as to evince an intention to abandon the contract or a design no longer to be bound by its terms.⁴ Refusing to pay at the time called for by a contract to deliver articles falls under this exception.⁵

§ 449. **Alternative Promises.** — Where promises are in the alternative, *i. e.*, where the promisor agrees to perform one of two or more different acts, he has a right to elect which one of the alternative promises he will perform;⁶ unless

¹ *Norrington v. Wright*, 115 U. S. 133; *King Philip Mills Co. v. Slater*, 12 R. L. 82.

² *Tiedeman Sales*, § 210, citing *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434; *Hine v. Klasey*, 9 Bradw. 166; *Winchester v. Newton*, 2 Allen, 492; *Gill v. Benjamin*, 64 Wis. 362.

³ *Norrington v. Wright*, *supra*; *Tyson v. Doe*, 15 Vt. 371; *Catlin v. Tobias*, 26 N. Y. 221; *Jenness v. Shaw*, 35 Mich. 20.

⁴ *Curtis v. Gibney*, 69 Md. 131; *Bradley v. King*, 44 Ill. 339; *Stewart v. Many*,

7 Bradw. 508; *Fletcher v. Cole*, 23 Vt. 114; *Blackburn v. Reilly*, 47 N. J. (L.) 308; *Haines v. Tucker*, 50 N. H. 207; *Stephenson v. Cady*, 117 Mass. 6; *Reybold v. Voorhees*, 30 Pa. St. 116; *Branch v. Palmer*, 65 Ga. 210; *Dwinel v. Howard*, 20 Me. 258; *Robson v. Bohn*, 27 Minn. 333; *Landeche v. Sarpy*, 37 La. Am. 835.

⁵ *Id.*

⁶ *Metz v. Albrecht*, 52 Ill. 491; *Norris v. Harris*, 15 Cal. 236; *Mayer v. Dwinell*, 29 Vt. 298; *Smith v. Sanborn*, 11 Johns. 59; *Disborough v. Neilson*, 3 Johns. Cas.

the election is expressly given to the promisee.¹ An election once made is final and irrevocable,² and if the promisor has a right to do one of two things by a given day, his right of election is lost if that day passes without his electing.³ A promise to pay a certain amount of money on a given day, with a stipulation following that it may be discharged in some other commodity, becomes an absolute promise to pay money, if that other commodity is not paid on the day.⁴

(c) *Subsidiary Promises.*

§ 450. *Subsidiary Promises Explained and Illustrated.*—Where in the contract there are several promises, and it appears that the non-performance of one of them does not materially affect the contract or frustrate its main object, then this partial failure will not act as a breach of the contract, but the other party will have his action for any damage he may have sustained from the failure.⁵

In *Bettini v. Gye*,⁶ the plaintiff, a professional singer, entered into a contract with the defendant, director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in concerts and operas for a considerable time and upon a number of terms, one of which was as follows: “(7) Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.” The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this as a discharge. But the court thought that this stipu-

81; *Choice v. Moseley*, 1 Ball. 136; 19 Am. Dec. 661.

¹ *Norris v. Harris*, 15 Cal. 236. If the promisee have the election, he must generally give notice of his election to the promisor before he can charge him. *Center v. Center*, 38 N. H. 318.

² *Brown v. Ins. Co.*, 1 El. & E. 833; *Gath v. Lees*, 3 Hurl. & C. 553.

³ *Choice v. Moseley*, 1 Ball. 136; 19 Am. Dec. 661; *Roberts v. Beatty*, 2 Fent. & W. 63; 21 Am. Dec. 410.

⁴ *Baker v. Todd*, 6 Tex. 273; 55 Am. Dec. 775; *Plummer v. Keaton*, 9 Yerg. 27; *Kalkman v. Bayles*, 17 Cal. 291.

⁵ *Weintz v. Hafner*, 78 Ill. 27.

⁶ 1 Q. B. Div. 188.

lation did not so go to the root of the matter as to render the performance of the rest of the contract by the plaintiff a thing different in substance from what the contract stipulated for, but it merely affected it in a way which could be compensated for in damages. Therefore it did not authorize the other party to abandon the contract.¹

On the other hand a promise is not subsidiary where it goes to the root of the contract, so that a failure therein would frustrate the main object of the contract. Thus, where a singer was engaged for a season to take the principal part in a new opera, it was held that her failure to perform on the opening and the three next succeeding nights, went to the root of the contract and discharged the other party.² And, in general, where the failure to perform a contract is in respect to matters which would render the performance of the residue a thing different in substance from what was contracted for, the party not in default may abandon the contract.³

II.

CONDITIONAL PROMISES.

§ 451. The Different Kinds of Conditional Promises.—

Where a person (say A) makes a promise to another (say B) which is not an absolute promise but subject to some condition, that condition is, as regards time, either (a) *subsequent*, (b) *concurrent* or (c) *precedent*.

(a) In the case of a *condition subsequent*, the rights of B under A's promise are determinable upon a specified event. The condition does not affect the commencement of B's rights, but its occurrence brings them to a conclusion. We have already dealt with conditions of this nature in speaking of the discharge of contract by agreement.⁴

¹ Another illustration of a subsidiary promise is to be found in a warranty on a sale of goods. See *post*, § 454.

² *Pousseard v. Splers*, 1 Q. B. D. 410.

³ *Leopold v. Salkey*, 89 Ill. 412.

⁴ See *ante*, § 400.

(b) In the case of a *condition concurrent*, the rights of B under A's promise are dependent upon his doing, or being prepared to do, something simultaneously with the performance of his promise by A. We have likewise already treated of this class of conditions.¹

(c) In the case of a *condition precedent*, the rights of B under A's promise do not arise until something has been done, or has happened, or some period of time has elapsed.

§ 452. **Suspensory and Dependent Conditions Distinguished.** — There are certain conditions which we have already met² which suspend the right to call for performance, as, for example, a condition that performance is not to be due until the happening of a future event, or until the doing of some act by some third person, or until a demand or notice of some kind is given. These we shall call *suspensory* conditions, and are to be distinguished from what we are considering here, and which we shall call *dependent* conditions, *i.e.*, conditions which effect a discharge of contract by their breach, if not performed at a fixed time or within a reasonable time from the making of the contract.

§ 453. **Dependent Conditions Precedent Must be Performed or Promise Discharged.** — A condition precedent of this character is defined as a promise, the untruth or non-performance of which discharges the contract.³ If the obligation of one promise is expressly or impliedly conditional upon the due performance of the other, then the performance of the promise constituting the executory consideration is a condition precedent to the liability to perform the other promise.⁴ Therefore, where A has expressly

¹ See *ante*, § 447; Independent Promises not Favored—Concurrent Promises.

² See *ante*, § 409.

³ Anson Contr. 303.

⁴ Leake Contr. 648; Oakley v. Morton, 11 N. Y. 25; 62 Am. Dec. 49; Roberts v.

Opdyke, 40 N. Y. 264; Crane v. Kimbel, 2 Jones & S. 455; Jenkins v. Wheeler, 3 Keyes, 655; Patridge v. Gildermelster, 1 Keyes, 99; Bersch v. Sander, 37 Mo. 104; United States v. Clark, 1 Hemp. 315; Malbon v. Birney, 11 Wis. 107; Dermott

or impliedly agreed to do a certain thing on condition that B previously does some other thing, if B does not do as he agreed A is discharged.¹ But the promise of B, as we have seen,² must be in regard to some matter which the parties to the contract have expressly stated shall be vital to its existence, or which upon a reasonable construction of the contract they may be deemed to have considered as vital.

§ 454. Condition and Warranty Distinguished. —

A warranty is a promise of indemnity against a failure to perform a term in the contract; it is an express or implied statement of something which the party undertakes shall be part of the contract; and though part of the contract, collateral to the express object of it. Therefore, the breach of a term which amounts to a warranty will *give a right of action*, but it will not, like the breach of a condition, *take away existing liabilities*; for it is a mere promise to indemnify.³

Much confusion has resulted from the courts having failed very often to distinguish between a warranty and a condition.⁴ A warranty is express when the seller actually assures the buyer of the existence or non-existence of a fact and implied when the law deduces or infers that assurance from the execution of the contract of sale.⁵ Examples of implied warranties upon the sale of goods have been already given in a former chapter.⁶

It follows that there is no right in the buyer of goods to rescind the contract because of a breach of warranty —

v. Jones, 2 Wall. 1; *Button v. Russell*, 55 Mich. 478; *Bell v. Hoffman*, 92 N. C. 273; *Kirkpatrick v. Alexander*, 60 Ind. 96; *Rogers v. Sheerer*, 77 Me. 823; *Harder v. Marion Co. Com.*, 97 Ind. 455; *Newhall v. Clark*, 3 Cush. 376; *Husted v. Craig*, 36 N. Y. 221.

¹ Cases in last note.

² *Ante*, § 448.

³ *Anson Contr.* 305; *Chanter v. Hopkins*, 4 M. & W. 404.

⁴ See remarks of Abinger, C. B., in *Chanter v. Hopkins*, 4 M. & W. 379; and of Martin, B., in *Azamar v. Casella*, L. R. 2 C. P. 677.

⁵ *Borrekins v. Bevan*, 3 Rawle, 23; *Otto v. Alderson*, 10 S. & M. 476; *Terhune v. Dever*, 38 Ga. 648; *Osgood v. Lewis*, 2 Har. & G. 405; *Neave v. Arnst*, 6 Wis. 174.

⁶ *Ante*, Cap. II, § 57.

otherwise the obligation of a warranty would not differ from the effect of a condition precedent — but his remedy is an action for damages.¹ But it is said by a recent author on the law of Sales,² that in the majority of the American States, for the purpose of avoiding circuitry of action as it is claimed, the buyer may even after acceptance of the goods bring his action for breach of warranty, rescind the contract of sale and return the goods, in place of bringing his action for damages.³

§ 455. *Waiver of Conditions.* — The performance of a condition may be waived by the party who has a right to enforce it, in which case the latter will be precluded from relying upon the performance of the residue as a condition precedent to his liability; but must perform the contract on his part, and rely upon his claim for damages in respect of the defective performance.⁴ Thus, where one of the parties

¹ *Voorhees v. Earl*, 2 Hill, 288; *Muller v. Eno*, 14 N. Y. 597; *Hoover v. Sidener*, 98 Ind. 290; *Wright v. Davenport*, 44 Tex. 164; *Buckingham v. Osborne*, 44 Conn. 133; *Street v. Blay*, 3 Barn. & Ad. 456; *Day v. Pool*, 52 N. Y. 416; *Messmore v. N. Y. Shot, etc., Co.*, 40 N. Y. 423; *Lawton v. Kell*, 61 Barb. 538; *Brigg v. Hilton*, 99 N. Y. 517; *Freyman v. Knecht*, 78 Pa. St. 141; *Bunce v. Beck*, 43 Mo. 379; *Lyon v. Bertram*, 20 How. 149. In *Brigg v. Hilton*, 99 N. Y. 529, it is said: "If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods or return them. If the contract is executory, and the goods yet to be manufactured, no title can pass until delivery or some equivalent act to which both parties assent; and when offered, the vendee may reject the goods as not answering the bargain, but if the sale was with warranty, he may receive the goods, and then the same consequences attach

as in the former cases, and among others, the right to compensation if the warranty is broken.

² *Tiedeman Sales*, § 197.

³ *Dorr v. Fisher*, 1 Cush. 371; *Morse v. Brackett*, 98 Mass. 209; *Marshall v. Perry*, 67 Me. 78; *Rogers v. Hanson*, 35 Iowa, 233; *Gates v. Bliss*, 48 Vt. 229; *Youghiogheny Iron Co. v. Smith*, 66 Pa. St. 340; *Marsh v. Low*, 55 Ind. 271; *Moral School Township v. Harrison*, 74 Ind. 93; *Dill v. Ferrell*, 45 Ind. 263; *O'Malley v. Hendrickson*, 29 N. J. (L.) 371; *Ralph v. Chicago, etc., Co.*, 33 Wis. 177; *Butler v. Northumberland*, 50 N. H. 33; *Jack v. Des Moines R. Co.*, 53 Iowa, 399; *Hyatt v. Boyle*, 5 Gill & J. 121; *Marston v. Knight*, 29 Me. 341; *Bryant v. Leburgh*, 13 Gray, 637; *Warder v. Fisher*, 48 Wis. 233; *Ruff v. Jarrett*, 94 Ill. 475; *Byers v. Chapin*, 28 Ohio St. 308.

⁴ *Ellen v. Topp*, 6 Ex. 441; *Graves v. Legg*, 9 Ex. 717; 23 L. J. Ex. 231; *Kehn v. Burness*, 3 Best & S. 755; 33 L. J. Ex. 206; *Shaw v. Lewiston Tp. Co.*, 3 P. & W. 454; *McCord v. West Feliciana Co.*, 3 La. Ann. 785; *Haden v. Coleman*, 78 N. Y. 567; *Smith v. Alker*, 103 N. Y. 87; *Murray v. Farthing*, 6 Mo. 261; *Hobart v. Beera*,

to a contract is bound to do certain work within a certain time, and fails to complete it within the stipulated time, and the other party urges him to go on, this is a waiver of strict performance as to time, and a recovery may be had on the basis of the amount and value of the work done, reckoned at the contract price, deducting damages for the delay.¹

Waiver may be express or implied, but to constitute a waiver, the acts or circumstances relied on to constitute it must have been performed or have transpired after the party against whom the waiver is urged knew, or should have known, the facts constituting the breach.² The act or words must show an intention to waive the right of enforcing the condition in order to constitute a waiver.³ And although mere delay or negligence in the enforcement of the condition does not, in itself, amount to a waiver,⁴ it is a fact from which, if it be not explained by the proof of facts which make the delay reasonable or inevitable,⁵ waiver may be inferred.⁶ A mere mental determination to waive the performance of the condition will not, if uncommunicated by acts or words, constitute a waiver.⁷

26 Kan. 329; *Reformed Church v. Brown*, 29 Barb. 336; 4 Abb. App. 31; *Bristol v. Tracy*, 21 Barb. 226; *Weaver v. Wianer*, 51 Barb. 638.

¹ *Phillips v. Seymour*, 91 U. S. 646; *Eyster v. Parrott*, 83 Ill. 517.

² *Dodge v. Minn., etc., Roofing Co.*, 14 Minn. 49. Payment or part payment for work done is not, of itself, and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work. *Moulton v. McOwen*, 103 Mass. 587; *Morrison v. Cummings*, 28 Vt. 496.

³ *Fishback v. Van Dusen*, 33 Minn. 117; *Faller v. Bean*, 32 N. H. 290; *Farlow v. Ellis*, 15 Gray, 229; *Hammett v.*

Linnemann, 48 N. Y. 399; *Smith v. Den- nie*, 6 Pick. 262.

⁴ *Fishback v. Van Dusen*, 33 Minn. 117; *Farlow v. Ellis*, 15 Gray, 229.

⁵ *Stone v. Perry*, 16 Me. 48; *Whitney v. Eaton*, 14 Gray, 225; *Goldsmith v. Bryant*, 26 Wis. 54; *Hirschorn v. Canney*, 98 Mass. 149; *Scudder v. Bradbury*, 106 Mass. 423.

⁶ *Smith v. Dennis*, 6 Pick. 262; *Hutch- ings v. Munger*, 41 N. Y. 153; *Fishback v. Van Dusen*, 33 Minn. 111; *Mixer v. Cook*, 31 Me. 340; *Scudder v. Bradbury*, 106 Mass. 427; *Goldsmith v. Bryant*, 26 Wis. 54; *Bowen v. Burk*, 13 Pa. St. 146.

⁷ *Maxwell v. Briggs*, 17 Vt. 176.

PART V.

THE REMEDIES UPON THE CONTRACT.

§ 456. THE REMEDIES FOR BREACH OF A CONTRACT.

§ 456. **The Remedies for Breach of a Contract.**— For all the rights invaded and all the wrongs suffered in and about the contract and during the period of the contractual relation Remedies are given by the law to the party injured. These remedies are of various kinds, and they may relate to or grow out of the making of the contract, or they may relate to and grow out of the breach of the contract. The former have been treated in several of the preceding chapters, while the latter will be discussed in the next succeeding chapters.

The remedies open to a person who is injured by the breach of a contract made with him, are of two kinds: he may seek to obtain *damages* for the loss he has sustained; or he may seek to obtain *specific performance* of the contract which the other party has refused or neglected to perform.¹

¹ Every breach of contract entitles the injured party to *damages*, though they be but nominal; but it is only in the case of certain contracts and under

certain circumstances that *specific performance* can be obtained. See *post*, § 472.

CHAPTER XVII.

DAMAGES.

SECTION 457. Introductory.

- 458. Foundation principle of damages is compensation.
- 459. Measure of damages — Rules in *Hadley v. Baxendale*.
- 460. First rule in *Hadley v. Baxendale*.
- 461. Second rule in *Hadley v. Baxendale*.
- 462. Third and fourth rules in *Hadley v. Baxendale*.
- 463. Punitive damages and injuries to feelings.
- 464. Duty not to increase damages.
- 465. Liquidated damages and penalties distinguished.
- 466. Same — Construction of contracts as to
- 467. Same — Rules for construction of such contracts.
- 468. Recovery for what has been done under uncompleted contract — Where contract divisible.
- 469. Same — Where contract entire.
- 470. Same — Where default in performance willful.
- 471. No second action for same damage.

§ 457. **Introductory.** — We come now to the question — the contract being broken and an action for damages being brought upon it, and the damages being unliquidated, *i. e.*, unascertained in the terms of the contract itself,¹ — what is the amount which the plaintiff, if successful, is entitled to recover, *i. e.*, what is, to use the legal term, the *measure of damages*?

§ 458. **Foundation Principle of Damages is Compensation.** — The rule of law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.² In other words *compensation to the injured party is*

¹ See *post*, § 465.

² *Robinson v. Harman*, 1 Ex. 868.

the foundation principle of damages.¹ Thus, where no loss accrues from the breach of contract, the plaintiff is nevertheless entitled to a verdict, but for "nominal" damages only; nominal damages meaning "a sum of money that may be spoken of, but that has no existence in point of quantity,"² or, as they have been called by an old writer, "a mere peg to hang costs on."³ On a breach of a promise to pay a certain sum of money, nothing more than the sum due can be recovered,⁴ the possible loss to the creditor by being kept out of his money not being allowed to be considered by the jury in assessing damages.

§ 459. **Measure of Damages — Rules in *Hadley v. Baxendale*.** — The leading case is *Hadley v. Baxendale*.⁵ Here Hadley & Co. were owners of a mill, and the shaft of one of their engines having broken they gave it to the defendant, a carrier, to take to an engineer to serve as a pattern for a new one; the defendant's clerk being informed that the mill was stopped and that the shaft must be delivered immediately. But through the negligence of the defendant the shaft was not delivered promptly and in consequence Hadley & Co. did not get the new shaft until several days after they otherwise would have done, the mill in the meantime remaining silent and idle to the pecuniary loss of the proprietors. For the loss of the profits which they would have made if the new shaft had come to them

¹ *Griffin v. Colver*, 16 N. Y. 494; *Noble v. Ames Manuf. Co.*, 112 Mass. 497; *Oroucher v. Oakman*, 8 Allen, 185; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407; *Buckley v. Buckley*, 12 Nev. 439; *Allison v. Chandler*, 11 Mich. 552; *Friedlander v. Pugh*, 48 Miss. 111; *McLelland v. Snider*, 18 Ill. 58; *King v. Gilson*, 33 Ill. 348; 83 Am. Dec. 269; *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Osborn v. Stassen*, 25 Kan. 736; *Eckel v. Murphey*, 15 Pa. St. 498; 53 Am. Dec. 607.

² *Beaumont v. Greathead*, 2 C. B. 494;

Fulkerson v. Eads, 19 Mo. (App.) 620; *Heichew v. Hamilton*, 4 G. Greene, 317; 61 Am. Dec. 122; *First Nat. Bk. v. Tel. Co.*, 30 Ohio St. 553; 27 Am. Rep. 485.

³ See *Stanton v. N. Y. R. Co.*, 59 Conn. 272; 21 Am. St. Rep. 110.

⁴ Interest is also allowed by statute in most of the States. See the provisions of the statutes in 1 *Stimson's American Statute Law*. As to the recovery of interest generally see *Lawson Rights, Rem. & Pr.*, §§ 2434-2468.

⁵ 9 Ex. 341.

when they expected it, Hadley & Co. brought an action and the question was whether the damages were too remote. The court held that if the carrier had been made aware that a loss of profits would result from delay on his part he would have been answerable. But it did not appear that he knew that the want of the shaft was the only thing which was keeping the mill idle, and therefore he could not be liable for the loss of profits. The court laid down the following as the rules for ascertaining the measure of damages in action for breaches of contract, viz.:—

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be:

(1) *Such as may fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself.*

(2) *Such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*

(3) *Such as arose out of the special circumstances under which the contract was made, where such circumstances were communicated by the plaintiff to the defendant.*

(4) *But, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise generally, not affected by any special circumstances.*

Hadley v. Baxendale, and the principles it lays down regarding the measure of damages, have been followed in all the courts of the United States.¹ We shall now examine the four rules in detail.

¹ Damages are said to be either *general* or *special*. General damages are the consequence of the breach of contract, or other injurious act, irrespective of any special circumstances; as the loss of money caused by the non-payment of a debt, or the deprivation of goods caused

by a failure to deliver under a contract of sale. *Vanderlidge v. Newton*, 4 N. Y. 180. Special damages are the further consequence caused by the breach of contract happening under special circumstances, as where a contract is made or goods are ordered for a special

§ 460. **First Rule in *Hadley v. Baxendale*.**—It will be observed that the first rule in *Hadley v. Baxendale*, requires that the damages shall be the natural result of the breach. This means that the injury arising from the breach must be immediately connected with the breach of contract, and not merely connected with it through a series of causes intervening between the immediate consequences of the breach and the damage complained of.¹ Thus, where an opera house was not completed at the time agreed, whereby one of the singers took cold and the lessee lost the anticipated receipts of the performance, it was held that the damage arising from the sickness of the performer was too remote to be the subject of recovery.²

But as the natural result of one breaking his contract is to cause the other to suffer personal trouble and inconvenience³ or to put him to expense in carrying out what the defendant had agreed to do,⁴ damages for these where they naturally flow from the breach of the contract are properly recoverable.

§ 461. **Second Rule in *Hadley v. Baxendale*.**—The damage may also include such matters as both parties, in making the contract, might reasonably expect to be the consequence in the particular case; and in regard to which, therefore, they must be taken to have intended to contract.⁵

purpose, which purpose fails by reason of the default in performance. *Smith v. Sherman*, 4 Cush. 408.

¹ *Jackson v. Adams*, 9 Mass. 484; 6 Am. Dec. 94; *Bond v. Quattlebaum*, 1 McCord, 584; 10 Am. Dec. 702; *Ashe v. De Rossett*, 5 Jones, 299; 72 Am. Dec. 552; *Milhels Mfg. Co. v. Day*, 50 Iowa, 250; *Bellmeyer v. Wagner*, 91 Pa. St. 92; *Finstenburg v. Fawcett*, 61 Md. 184; *Blanchard v. Ely*, 21 Wend. 342; 34 Am. Dec. 250; *Herring v. Scaggs*, 62 Ala. 180; 34 Am. Rep. 4; *Osborne v. Poket*, 33 Minn. 10; *Friend, etc., Lumber Co. v. Miller*, 67 Cal. 464; *McGovern v. Lewis*,

56 Pa. St. 231; 94 Am. Dec. 60; *Mackey v. Olsen*, 12 Oregon, 429.

² *Academy of Music v. Hackett*, 2 Hilt. 217.

³ *Hobbs v. R.R. Co.* L. R. 10 Q. B. 111; *Lord Mannors v. Johnson*, L. R. 1 Ch. Div. 673.

⁴ *Barker v. Mann*, 5 Bush, 672; 96 Am. Dec. 373.

⁵ *Goodloe v. Rogers*, 9 La. Ann. 275; 61 Am. Dec. 205; *Cutting v. Grand Trunk R. R. Co.*, 13 Allen, 285; *Hurd v. Denmore*, 63 N. H. 171; *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 388; *Houatom R. Co. v. Hill*, 63 Tex. 385; *Shouse v.*

Thus, where a landlord agreed in a lease of a farm to repair the fences so as to secure the crop, and failed to do this, and cattle broke in and injured the crops, it was held that he was liable for that damage to the crops, for it was obvious in such a case that such a damage must have been understood by the parties to be a probable result of a breach.¹

And this rule permits the recovery of anticipated profits where their loss might reasonably be supposed to have been in the contemplation of both parties, at the time of the making of the contract, as the result of non-performance,² provided the loss of the profits be the natural and necessary result of the breach³ and not losses arising from other collateral undertakings entered into upon the faith of the promise.⁴ But the only profits that can be compensated for are such as are not merely speculative or conjectural but which are capable of being ascertained by the rules of evidence, to a reasonable degree of certainty.⁵

Neiswaenger, 18 Mo. App. 245; *Hammer v. Schoenfelder*, 47 Wis. 459; *Shepard v. Milwaukee Gas Co.*, 15 Wis. 318; *Illinois Central R. R. Co. v. Cobb*, 64 Ill. 128; *Fleming v. Beck*, 48 Pa. St. 312; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 155.

¹ *Culver v. Hill*, 66 Ala. 66; 44 Am. Rep. 134.

² *U. S. v. Behan*, 110 U. S. 338; *Boyd v. Meighan*, 48 N. J. L. 404; *Hubbard v. Rowell*, 51 Conn. 423; *Schneider v. U. S.*, 19 Ct. of Cl. 547; *Adams Ex. Co. v. Egbert*, 36 Pa. St. 360; 78 Am. Dec. 383; *Taft v. Tiede*, 55 Ia. 370.

³ *Coweta Falls Manfg. Co. v. Rogers*, 19 Ga. 416; 65 Am. Dec. 603; *McKinnon v. McKewan*, 48 Mich. 106; 42 Am. Rep. 458; *Hoy v. Grönoble*, 34 Pa. St. 9; 75 Am. Dec. 628; *Simmons v. Brown*, 5 R. I. 299; 73 Am. Dec. 66; *Adams Ex. Co. v. Egbert*, 36 Pa. St. 360; 78 Am. Dec. 382; *Field v. U. S.*, 16 Ct. of Cl. 434; *Pitts. Steel Co. v. Hinckley*, 17 Fed. Rep. 584; *Goodrich v. Hubbard*, 51 Mich. 63; *Wlaner v. Barber*, 10 Or. 342; *Fairchild v. Rogers*, 32 Minn. 269; *Donnell v. Jones*, 17 Ala. 689; 52 Am. Dec. 194; *Fuller v. Curtiss*, 100 Ind. 237;

50 Am. Rep. 736; *Howe Machine Co. v. Bryson*, 44 Ia. 159; 24 Am. Rep. 755.

⁴ *Masterton v. Mayor*, 7 Hill, 61; 42 Am. Dec. 33; *Wallace v. Ah. Sam*, 71 Cal. 197; 60 Am. Rep. 534; *Bridges v. Lanham*, 14 Neb. 369; 45 Am. Rep. 121.

⁵ *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Muldrew v. Norris*, 2 Cal. 74; 56 Am. Dec. 313; *Wolcott v. Mount*, 36 N. J. (L.) 292; 13 Am. Rep. 438; 38 N. J. (L.) 496; 20 Am. Rep. 425; *Miss., etc., Boom Co. v. Prince*, 34 Minn. 71; *Union Refining Co. v. Barton*, 77 Ala. 143; *Brigham v. Carlisle*, 78 Ala. 243; 56 Am. Rep. 28; *Fairchild v. Rogers*, 32 Minn. 269; *Hubbard v. Russell*, 51 Conn. 423; *Sterling Organ Co. v. House*, 25 W. Va. 64; *Howe Machine Co. v. Bryson*, 44 Ia. 159; 24 Am. Rep. 735; *Lewis v. Atlas Mut. Ins. Co.*, 61 Mo. 534; *Allis v. McLean*, 48 Mich. 432; *Miller v. Jannett*, 63 Tex. 87; *Jones v. Nothrop*, 7 Colo. 1. These cases exclude the recovery of expected profits, not because they are profits but because there is no method of ascertaining with certainty the amount which should be allowed. A decision quite at variance with these

§ 462. **Third and Fourth Rules in Hadley v. Baxendale.** — The third and fourth rules grown out of the second and amount to this, viz.: that any special loss which might accrue to the plaintiff, but which would not naturally and obviously flow from the breach but for special circumstances in the contract, is not recoverable, unless it be shown that those circumstances were known to the defendant, in which case the law presumes that the consequences of the breach were contemplated. This principle is well stated by Earl, C. J., in a New York case.¹ “Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. * * * A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts.”

§ 463. **Punitive Damages and Injuries to Feelings.** — Damages in an action for breach of contract are always by way of compensation and not of punishment. Hence a plaintiff can never recover more than such pecuniary loss as he has sustained. Nor can he (as he may in an action of

conclusions is the case of *Wakeman v. Wheeler, etc.*, 8 M. Co., 101 N. Y. 206; 54 Am. Rep. 676, where it is laid down that profits if they are the natural result of the breach are none the less recoverable because it is difficult to ascertain the amount, but the jury must come as near to a just verdict as the nature of the case admits. And this seems to be the English rule. Thus in *Simpson v. L. & N. W. R. Co.*, 1 Q. B. Div. 374, a manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He intrusted some

such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, this difficulty was no reason for not giving any damages at all.

¹ *Leonard v. New York Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 447.

tort) recover for mere disappointment, or injury to the feelings, or vexation of mind, caused by the breach.¹ To this general rule, however, the breach of promise of marriage is an exception, for in such case the feelings of the person injured are taken into account, apart from such specific pecuniary loss as can be shown to have arisen.²

§ 464. **Duty Not to Increase Damages.** — One injured by a breach of contract is required by the law to make reasonable exertions to render the injury as light as possible; and if, instead of so doing, he, through his negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss falls upon him.³ Thus where one has employed an agent to procure insurance on his property, and knows of his neglect to do so in ample time to procure it himself, he cannot hold the agent for a loss by such neglect.⁴

§ 465. **Liquidated Damages and Penalties Distinguished.** — The parties to a contract not infrequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. This is perfectly legal, and on a breach the sum agreed upon becomes the measure of damages;⁵ as, for example, a stipulation in a building contract that if the building is not completed by a certain day the contractor will pay a certain fixed sum for each day or week or month he is in default,⁶ or an agree-

¹ *Houston, etc., R. R. Co. v. Shirley*, 54 Tex. 125.

² *Frost v. Knight*, L. R. 7 Ex. 116; *Duche v. Wilson*, 37 Hun, 519; *Johnson v. Travis*, 33 Minn. 231; *Colt v. Wallace*, 24 N. J. L. 291; *Thorn v. Kuapp*, 42 N. Y. 474; 1 Am. Rep. 561; *Royal v. Smith*, 40 Ia. 615; *Dupont v. McAdow*, 6 Mont. 226; *Reed v. Clark*, 47 Cal. 194; *Collins v. Mack*, 31 Ark. 685.

³ *Hamilton v. McPherson*, 28 N. Y. 72;

84 Am. Dec. 330; *Wright v. Metropolis Bank*, 110 N. Y. 237; 6 Am. St. Rep. 356.

⁴ *Brant v. Gallop*, 111 Ill. 457; 53 Am. Rep. 638.

⁵ *Pearson v. Williams*, 24 Wend. 246; 26 Wend. 630; *Williams v. Vance*, 9 S. O. 374; 30 Am. Rep. 26; *Lynde v. Thompson*, 2 Allen, 456; *Gilles v. Hall*, 7 Phila. 425; *Tardeveau v. Smith, Hardin*, 175; 3 Am. Dec. 727.

⁶ *Watts v. Sheppard*, 2 Ala. 425; *Wor*

ment in a contract of sale that a certain sum shall be deducted from the purchase price if the quantity is not delivered as agreed.¹ These are called "*liquidated damages*."

But the parties in affixing a fixed sum for the non-performance of his promise by one, or each of them, may have intended not to assess the damages at which they rate the non-performance of the promise, but to secure its performance by the imposition of a penalty in excess of the actual loss likely to be sustained. And in this case, the amount recoverable is limited to the loss actually sustained, regardless of the sum undertaken to be paid by the defaulter.² These are called "*penalties*."³

§ 466. Same — Construction of Contracts as to. — The courts will always construe the contract in harmony with the intention of the parties, and without regard to the terms used. If the general effect of the agreement shows that they intended to provide for a penalty they will restrict the recovery to the actual damages incurred although the words "liquidated damages," are used in the instrument.⁴ So,

rall v. McClingham, 5 Strob. 115; *Louis v. Brown*, 7 Or. 336; *Hall v. Orowley*, 5 Allen, 304; 81 Am. Dec. 745.

¹ *Bergheim v. Blaenavon Iron Co.*, L. R. 10 Q. B. 317.

² *Whitfield v. Levy*, 35 N. J. (L.) 149; *Shiel v. McNitt*, 9 Paige, 101; *Niver v. Roseman*, 18 Barb. 50; *Perkins v. Lyman*, 11 Mass. 88; *Morse v. Rathburn*, 42 Mo. 594; 97 Am. Dec. 359; *Berry v. Wisdom*, 3 Ohio St. 344; *Curry v. Larer*, 7 Pa. St. 470; 49 Am. Dec. 486; *Shreve v. Brereton*, 51 Pa. St. 175; *Heatwole v. Gorrell*, 35 Kan. 697; *Bradstreet v. Baker*, 14 R. L. 546; *Pennybacker v. Jones*, 106 Pa. St. 237; *Lansing v. Dodd*, 45 N. J. (L.) 525; *Dally v. Litchfield*, 10 Mich. 29; *Trustees v. Walrath*, 27 Mich. 232; *Daniel v. Brown*, 54 Me. 468.

³ Thus in bonds, the penalty is generally placed at double the sum, yet only the exact amount of damage caused by the non-performance can be recovered.

But there is this distinction between bonds and other written instruments. In an action on a bond the obligee can in no case recover more than the amount of the penalty. *Warden v. Nielson*, 1 Murph. 275; 3 Am. Dec. 691; *Carter v. Carter*, 4 Day, 30; 4 Am. Dec. 177; *Cherry v. Mann*, Cooke, 268; 5 Am. Dec. 696; *Lombard v. Mayberry*, 24 Neb. 674; 8 Am. St. Rep. 234. While in the case of other instruments, the action may be brought for a breach without regard to the penalty and if they can be proved, damages in excess of it may be recovered. *Holley v. Holley*, Litt. Sel. Cas. 505; 12 Am. Dec. 342; *Graham v. Bickham*, 2 Yeates, 32; 1 Am. Dec. 338; *Shreve v. Brereton*, 51 Pa. St. 175.

⁴ *Dwinel v. Brown*, 54 Me. 468; *Foley v. Keegan*, 4 Ia. 1; 68 Am. Dec. 107; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713; *Dennis v. Cummins*, 3 Johns. Cas. 297; 2 Am. Dec. 160; *Baird v. Tolliver*, 6

where the parties have used the milder term "penalty," the courts have yet held that the stipulated sum was, from the nature of the case, to be considered as liquidated damages and recoverable in full.¹ "Whether the sum mentioned in an agreement to be paid for a breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of law, to be decided by the judge, upon a consideration of the whole instrument."² Where it is plain that the parties meant the sum fixed to be liquidated damages, the courts will not interfere to frustrate that intention,³ but, if it be doubtful, upon the whole agreement, whether the sum named was intended to be a penalty or liquidated damages, it will be construed to be a penalty, it being the tendency of the courts to consider the contract as creating a penalty to cover the damages actually sustained by a breach, rather than liquidated damages.⁴

§ 467. Same — Rules for Construction of Such Contracts.—Subject to the principles stated in the last section the courts have adopted certain rules of construction, in the case of contracts containing promises of this kind; which are —

1. If the contract is for a matter of certain value and a

Humph. 188; 44 Am. Dec. 298; Shreve v. Brereton, 51 Pa. St. 175; Curry v. Larer, 7 Pa. St. 470; 49 Am. Dec. 487; Moore v. Platte Co., 8 Mo. 467; Jackson v. Baker, 2 Edw. Ch. 471; Hoagland v. Segur, 38 N. J. (L.) 236; Watts v. Sheppard, 2 Ala. 426; Davis v. Freeman, 10 Mich. 188; Thorogood v. Walker, 2 Jones, 15; Grand Tower Co. v. Phillips, 23 Wall. 471.

¹ Sparrow v. Paris, 7 Hurl. & N. 594; 21 L. J. Ex. 137; Parfitt v. Chambre, L. R. 15 (Eq.) 36; Shreve v. Brereton, 51 Pa. St. 175; Duffy v. Shockey, 11 Ind. 70; 71 Am. Dec. 349.

² Sauter v. Ferguson, 1 Man. & G. 286; Chase v. Allen, 13 Gray, 42; Shute v. Hamilton, 3 Daly, 462; Whitfield v. Levy, 35 N. J. (L.) 149; Noyes v. Phillips, 69 N. Y. 406; Hamaker v. Schroers, 49 Mo. 406; Kemp v. Knickerbocker Ice Co., 69 N. Y. 45; Jaqueth v. Hudson, 5 Mich. 123.

³ Williams v. Vance, 9 S. C. 344; 30 Am. Rep. 26; Bagley v. Peddie, 16 N. Y. 469; 69 Am. Dec. 713; Bearden v. Smith, 11 Rich. 550; Orisade v. Bolton, 3 Car. & P. 240; Dwinell v. Brown, 54 Me. 460; Brooks v. Hubbard, 3 Conn. 58; 8 Am. Dec. 154; Houghton v. Patee, 58 N. H. 326.

⁴ Colwell v. Lawrence, 38 N. Y. 71; Myer v. Hart, 40 Mich. 517; 29 Am. Rep. 553; Scofield v. Tompkins, 35 Ill. 190; 35 Am. Rep. 160; Cheddick v. Marsh, 21 N. J. (L.) 463; Shute v. Taylor, 5 Met. 67; Moore v. Platte Co., 8 Mo. 467; Foley v. McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Tayloe v. Sandiford, 7 Wheat. 13; Baird v. Tolliver, 6 Humph. 188; 44 Am. Dec. 298; Wallis v. Carpenter, 13 Allen, 19; Spencer v. Tilden, 5 Cow. 150; Shreve v. Brereton, 51 Pa. St. 175; Ricketson v. Richardson, 19 Cal. 330.

sum is fixed to be paid on breach of it which is in excess of that value, then the sum fixed is a penalty and not liquidated damages.¹

2. If the contract is for a matter of uncertain value and a sum is fixed to be paid on breach of it, the sum is recoverable as liquidated damages. There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree."²

3. Where the contract involves several distinct matters of various kinds, and one fixed sum is stipulated to be paid for any breach, of whatever kind, it is a penalty and not liquidated damages.³

In *Kemble v. Farren*⁴ a contract between the manager of a theater and an actor, containing many stipulations on each side, of various degrees of importance, as to the times and manner of the performances, the regulations of the theater, and for the payment of salary at so much per night, provided that if either party should neglect to fulfill the said agreement, or any part thereof, he should pay to the other the sum of £1,000. It was held that the sum was a penalty, and not liquidated damages. Tindal, C. J., said: "If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day,

¹ *Taylor v. Sandiford*, 7 Wheat. 13; *Scofield v. Tompkins*, 95 Ill. 190; 35 Am. Rep. 160; *Mason v. Callender*, 2 Minn. 350; 72 Am. Dec. 103.

² *Hamilton v. Overton*, 6 Blackf. 206; 38 Am. Dec. 136; *Cotheal v. Talmage*, 9 N. Y. 551; 61 Am. Dec. 717; *Morse v. Rathburn*, 42 Mo. 594; 97 Am. Dec. 359; *Powell v. Burroughs*, 54 Pa. St. 329; *Chase v. Allen*, 13 Gray, 42; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Jacquith v. Hudson*, 5 Mich. 123; *Nobles v. Bates*, 7 Cow. 307; *Smith v. Smith*, 14 Wend. 468; *Dakin v. Williams*, 17 Wend. 447; *Lange v. Werk*, 2 Ohio St. 519; *Dunlop v. Gregory*, 10 N. Y. 241; 61 Am. Dec. 746; *California Steam Nav. Co. v. Wright*,

6 Cal. 259; 65 Am. Dec. 511; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *Holbrook v. Tobey*, 68 Me. 410; 22 Am. Rep. 581; *Muse v. Swayne*, 2 Lea. 251; 31 Am. Rep. 607; *Cushing v. Drew*, 97 Mass. 445. Yet the sum named must not be unconscionable in its amount or the court will relieve. *Bradstreet v. Baker*, 14 R. I. 546; *Davis v. U. S.*, 17 Cl. Cl. 201.

³ *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107; *Owens v. Hodges*, 1 McMull. 106; *Carpenter v. Lockhart*, 1 Ind. 134; *Charleston Fruit Co. v. Bond*, 26 Fed. Rep. 18; *Thorngood v. Walker*, 3 Jones, 15.

⁴ 6 Bing. 141.

or on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

§ 468. **Recovery for What Has Been Done Under Uncompleted Contract — Where Contract Divisible or Severable.** — Where a contract is severable or divisible¹ an action may be brought for what has been done though complete performance is not made. A contract consisting of several distinct items, and founded on a consideration which is apportioned to each item, is severable.² Thus, after a part delivery of goods sold at a separate price for each article, the vendor, being unable to deliver the whole quantity sold, may recover the stipulated price of those actually delivered, less the damages arising from the non-delivery of the whole.³ So on a contract for work, consisting of separate items, the price being apportioned to each item, or left to implication of law.⁴ In *Veerkamp v. Hulburd Canning, etc., Co.*,⁵ the defendant agreed to buy

¹ See *ante*, § 448, as to what are severable or divisible contracts.

² *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Jackson v. Cleveland*, 15 Wis. 107.

³ *Veerkamp v. Hulburd Canning Co.*, 58 Cal. 327; 41 Am. Rep. 265; *Cole v. Swanston*, 1 Cal. 51; 52 Am. Dec. 238; *Mixer v. Williams*, 17 Vt. 457; *Maryland Fertilizing Co. v. Lorentz*, 44 Md. 218; *Scott v. Coal Co.*, 89 Pa. St. 231; 33 Am

Rep. 753; *Avery v. Wilson*, 81 N. Y. 341; 37 Am. Rep. 503; *Re Lee*, 4 Ct. of Cl. 156.

⁴ *Dibol v. Minet*, 9 Iowa, 403; *Baeder v. Currie*, 44 N. J. (L.) 208; *Tenny v. Mulvaney*, 8 Oregon, 129; *Spear v. Snider*, 29 Minn. 468; *Snook v. Fries*, 19 Barb. 313; *Haney v. Caldwell*, 85 Ark. 136; *Booth v. Tyson*, 15 Vt. 515.

⁵ 58 Cal. 229; 41 Am. Rep. 265.

all the fruit raised by the plaintiff and delivered at its works, at a uniform price per pound. As it ripened, the plaintiff delivered, and the defendant accepted, quantities from time to time, but declined to pay for any until the whole was delivered. The plaintiff discontinued delivering, and sued for the price of that delivered, and it was held that the action was maintainable.

§ 469. *Same — Where Contract Entire.* — Where, on the other hand, a person promises to do a certain thing and his compensation is either expressly or impliedly dependent upon the thing being entirely completed by him, a partial performance will be of no avail and he can recover nothing either upon the contract or upon a *quantum meruit* for what has been performed. The leading case upon this rule of the common law is *Cutter v. Powell*.¹ Here the defendant had a ship which was about to sail from Jamaica to England and wanted a second mate. In answer to an advertisement a suitable person presented himself in the shape of Mr. T. Cutter, and the defendant gave him a note to this effect: "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter, the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool." The ship set sail and arrived at Liverpool on October 11th. Cutter did his duty as second mate until the 20th of September, when he died. It was held that his representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a *quantum meruit* for such services as he had rendered, because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a *quantum meruit*. "It may fairly be considered," said

¹ 6 T. R. 320; 2 Smith Lead. Cas. 13.

Grose, J., "that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage." Following the principle of *Cutter v. Powell*, it is held that a contract to do a certain thing or to work a certain term for a certain sum is an entire contract, and unless the thing is completed or the full term served, no recovery can be had for the part performance.¹ And it makes no difference that the failure was without the fault of the party; thus, under an entire contract for the building of a house, if the property is destroyed before its completion, the builder can recover nothing.²

The more recent decisions lean towards and some of them expressly announce a more equitable rule. Thus, in a recent Missouri case, A agreed to make and put in place certain church fixtures. He was to be paid on the completion and acceptance of the work. Before its completion and acceptance, the church burned down, and it was held that A could recover for as much as he had done up to the time of the fire.³ And in Michigan it is laid down that "where the articles delivered were a part only of those agreed to be furnished upon a special contract, which was entire in its

¹ *Grant v. Johnson*, 5 N. Y. 247; *Reab v. Moor*, 19 Johns. 337; *Champlin v. Rawles*, 18 Wend. 194; *Galvin v. Prentice*, 45 N. Y. 162; 6 Am. Rep. 58; *Oakley v. Morton*, 11 N. Y. 25; 62 Am. Dec. 49; *Sickels v. Pattison*, 14 Wend. 257; 28 Am. Dec. 527; *Bassett v. Child*, 11 Ill. 569; *Butler v. Butler*, 77 N. Y. 472; *Batre v. Simpson*, 4 Ala. 305; *Cunningham v. Jones*, 20 N. Y. 496; *Hartley v. Decker*, 80 Pa. St. 470; *Alcott v. Hugus*, 105 Pa. St. 350; *Rockford, etc., R. Co. v. Lent*, 63 Ill. 288; *Dula v. Cowles*, 7 Jones, 290; 75 Am. Dec. 643; *Coburn v. Hartford*, 38 Conn. 290; *Barker v. Beagan*, 4 Helsk. 590; *Simonds v. Pierce*, 31 Fed. Rep. 187; *Turner v. Baker*, 30 Ark. 188; *Jennings v. Lyons*, 29 Wis. 553; 30 Am. Rep. 57; *Holden Steam Co. v. Westervelt*, 67 Me.

446; *Haslack v. Mayers*, 26 N. J. (L.) 284; *Kohn v. Fandel*, 29 Minn. 470; *Difenback v. Stark*, 56 Wis. 462; 43 Am. Rep. 719; *Hansell v. Erickson*, 28 Ill. 267; *Union Bank v. Hemyard*, 15 S. O. 296; *Thayer v. Wadsworth*, 19 Pick. 349; *Earp v. Tyler*, 73 Mo. 617; *Freeman v. Galbraith*, Wright, 591; *Isaacs v. McAndrew*, 1 Mont. 437; *Larkin v. Buck*, 11 Ohio St. 561; *Stein v. Rose*, 17 Ohio St. 471.

² *Partridge v. Forsyth*, 29 Ala. 200; *Bramby v. Smith*, 3 Ala. 123; *Shanks v. Griffin*, 14 B. Mon. 153; *Newman Lumber Co. v. Furdam*, 41 Ohio St. 373; *Tompkins v. Dudley*, 26 N. Y. 273; 33 Am. Dec. 349.

³ *Haynes v. Baptist Church*, 88 Mo. 285; 57 Am. Rep. 413.

nature, providing one gross sum for the whole, yet the delivery of a part of the contracted articles only, and the defendant's acceptance and appropriation of these, had conferred a benefit upon him, and created a corresponding duty or implied contract, separate from, and independent of the special contract, to pay what such delivered portion was reasonably worth; leaving to the defendant the right to recoup in this action, or to recover in another such damages as he might be able to show he had sustained by the plaintiff's failure to perform the special contract."¹ This departure from the common law rule is approved of in a number of cases.²

§ 470. Same — Where Default in Performance Willful. — Where the default in full performance is the result of a willful refusal, the party is not entitled to any equitable relief and hence should not be entitled to recover the value of his part performance.³ The adjudications in most of the States therefore lay it down that where a person employed for a term under an entire contract abandons and refuses to complete it without legal cause he can recover nothing for what he has done.⁴ Nevertheless there are courts which will

¹ *Wilson v. Wagar*, 26 Mich. 464.

² *Wolf v. Gerr*, 43 Ia. 339; *Richards v. Shaw*, 67 Ill. 232; *Lee v. Ashbrook*, 14 Mo. 378; 55 Am. Dec. 110; *Hollis v. Chapman*, 36 Tex. 1; *Blood v. Enos*, 12 Vt. 625; 36 Am. Dec. 363; *Ryan v. Dayton*, 25 Conn. 188; 65 Am. Dec. 560; *Bast v. Byrne*, 51 Wis. 537; 37 Am. Rep. 841; *Murphy v. St. Louis*, 8 Mo. App. 433.

³ *Winstead v. Reid*, Busb. 76; 57 Am. Dec. 571; *Springdale Association v. Smith*, 33 Ill. 252; See *Bishop on Contr.*, § 1415; *Brewster v. Burnett*, 125 Mass. 68; 28 Am. Rep. 203; *Lane v. Hogan*, 5 Yerg. 290; *Mayer v. New York*, 63 N. Y. 455; *Devine v. Edwards*, 87 Ill. 177; *Bishop v. Brown*, 51 Vt. 330; *Dermott v. Jones*, 2 Wall. 1; *Dula v. Cowles*, 2 Jones (N. C.), 454; *Lewis v. Easther*, 2 Oranch c. c. 423; *Brown v. Kimball*, 12 Vt. 617; *Malbon v. Birney*, 11 Wis. 107; *Bayard v.*

McLane, 3 Harr. 139; *Martin v. Schoenberger*, 8 Watts & S. 367; *Niblett v. Herring*, 4 Jones (N. C.), 263.

⁴ *Smith v. Brady*, 17 N. Y. 173; 73 Am. Dec. 442; *Lantry v. Parks*, 8 Cow. 63; *Olmstead v. Beale*, 19 Pick. 523; *Davis v. Maxwell*, 12 Met. 290; *Brown v. Fitch*, 33 N. J. (L.) 418; *Bragg v. Bradford*, 33 Vt. 35; *Eldridge v. Rowe*, 2 Gilm. 91; 43 Am. Dec. 41; *Wolfe v. Howes*, 20 N. Y. 197; 75 Am. Dec. 384; *Hogan v. Titlow*, 14 Cal. 255; *Angle v. Hanna*, 29 Ill. 429; 74 Am. Dec. 161; *Webb v. Duckingfield*, 13 Johns. 389; 7 Am. Dec. 388; *Martin v. Schoenberger*, 8 Watts & S. 367; *Gwhan v. Dally*, 4 Ala. 336; *Gillis v. Space*, 68 Barb. 177; *Larkin v. Buck*, 11 Ohio St. 561; *Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337; *Earp v. Tylor*, 73 Mo. 617; *McMillan v. Vanderlip*, 12 Johns. 165; 7 Am. 299; *Tipton v. Feltner*, 20 N.

permit a partial recovery even in such a case as this, leaving to the defendant a right to set off such damages as he may have suffered from the abandonment.¹

§ 471. **No Second Action for Same Damage.** — Where the damages have been finally assessed in an action, the amount is conclusive, and no future loss subsequently arising from the same cause can be made the ground of a new action.² One who has failed to recover all the damages occasioned him by a single breach of a contract, because he did not properly declare for a portion of them in the first suit, cannot maintain a second suit for the recovery of such portion.³ The party injured is entitled to recover for all damages previous to the trial, whenever it can be shown that the injury is continuous in its nature.⁴ Where there has been a total breach of contract, the plaintiff may, if he demands it, recover full and final damages for the future as well as the past, although the period for full performance has not elapsed.⁵ The true criterion whether damages for the non-performance of the whole contract, including damages not sustained when the action is brought and the suit is tried, can be recovered in an action for a breach of contract is, whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely putting an end to the contract.⁶

Y. 429; *Cunningham v. Morrell*, 10 Johns, 203; 6 Am. Dec. 332; *Jennings v. Camp*, 13 Johns. 94; 7 Am. Dec. 367; *Morrill v. Bemis*, 4 Denio, 121; *Mortmain v. Lefaux*, 6 Mart. (La.) 664; 12 Am. Dec. 435; *Byrd v. Boyd*, 4 McCord, 246; 17 Am. Dec. 740; *Wright v. Turner*, 1 Stew. 29; 18 Am. Dec. 35; *Posey v. Garth*, 7 Mo. 94; 37 Am. Dec. 183; *Henson v. Hampton*, 32 Mo. 410; *Schnerr v. Lemp*, 19 Mo. 42; *Millar v. Goddard*, 34 Me. 109; 56 Am. Dec. 633; *Swanzy v. Moore*, 23 Ill. 68; 74 Am. Dec. 134; *Uelichka v. Esterly*, 29 Minn. 146.

¹ *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; *Duncan v. Baker*, 31 Kan. 107; *Pixler v. Nichols*, 8 Ia. 106; 74 Am. Dec. 238; *McClay v. Hedge*, 18 Ia. 66;

Byerlee v. Mendel, 39 Ia. 332; *Puroell v. McComber*, 11 Neb. 209; 38 Am. Rep. 306; *Coe v. Smith*, 4 Ind. 79; 58 Am. Dec. 618; *Wolcott v. Yeager*, 11 Ind. 84; *Carroll v. Welch*, 25 Tex. 147; *Riggs v. Horde*, 25 Tex. Supp. 456; 78 Am. Dec. 584; *Chambliss v. Baker*, 95 N. C. 96; *Hollis v. Chapman*, 26 Tex. 1.

² *Gibbs v. Oruikahank*, L. R. 8 Com. P. 454.

³ *Morey v. King*, 51 Vt. 333.

⁴ *Puckett v. Smith*, 5 Stro. 26; 53 Am. Dec. 686.

⁵ *Tippin v. Ward*, 5 Or. 450.

⁶ *Remelee v. Hall*, 31 Vt. 582; 73 Am. Dec. 140.

But damages cannot be assessed in respect of any matter that would be ground for a new cause of action; as in the case of a continuing breach of a covenant to keep premises in repair, no damage can be given in respect of the probable continuance of the breach; but the damage for a continued breach must be sought in a new action, to which, therefore, the judgment recovered in a former action, including damages for the breach up to the time of that action only, would be no bar.¹

¹ *Coward v. Gregory*, L. R. 2 Com. P. 158.

CHAPTER XVIII.

SPECIFIC PERFORMANCE.

SECTION 472. The remedy of specific performance — general rules.

473. Specific performance decreed only where damages are inadequate remedy.

474. Contracts for the sale of lands.

475. Effect of the statute of frauds.

476. Contracts for the sale of chattels.

477. Breaches of contracts generally.

478. Performance compelled by means of injunction.

§ 472. The Remedy of Specific Performance—General Rules.—The common law treated every executory contract to sell or transfer a thing as a mere personal contract, and if left unperformed by the party no redress could be had except in damages. The common law therefore allowed the party to either perform the contract or pay damages at his election. But the equity courts considering this in many cases quite inadequate to do justice between the parties, required from the defaulting party a strict performance of what he had promised, and which he could not, without a manifest fraud on his part, refuse.

Thus arose the jurisdiction of equity to compel specific performance, and as it was based upon the absence of any adequate remedy at law, it follows that where damages at law will put the plaintiff in as good a position as if the agreement had been actually performed, equity will decline to interfere.¹ And on general principles what are good grounds for refusing damages are also good grounds for refusing specific performance. Thus, if the contract be de-

¹ See *post*, § 473.

fective in the essential elements of a contract, whether in its formation, in its matter, or the parties thereto, or if it be voidable for mistake, fraud, or duress, or void for illegality, no relief can be had.¹ Equity will refuse specific performance of a voluntary or gratuitous contract or a covenant that is not supported by a valid legal consideration.² And though adequacy of consideration is not in equity as it is not at law³ a material inquiry⁴ yet great inadequacy of consideration being regarded in equity as evidence of fraud, or mistake, or unfairness, or hardship, will materially influence the discretion of the court.⁵ Nor will the court decree specific performance where the contract is incomplete and uncertain;⁶ nor where there is strong

¹ *Bass v. Mayor*, Meigs, 421; 33 Am. Dec. 134; *Gerlach v. Skinner*, 34 Kan. 86; 55 Am. Rep. 240; *Dial v. Hair*, 18 Ala. 790; 54 Am. Dec. 179; *Kelly v. R. R. Co.*, 74 Cal. 557; 5 Am. St. Rep. 471; *Kelly v. Kendall*, 118 Ill. 650; *Edwards v. Handley, Hardin*, 602; 3 Am. Dec. 745; *Clay v. Williams*, 3 Munf. 105; 5 Am. Dec. 453; *Patterson v. Mariz*, 8 Watts, 374; 34 Am. Dec. 474; *Frisbie v. Ballance*, 4 Scam. 287; 39 Am. Dec. 409; *Scott v. Shiner*, 27 N. J. (Eq.) 185; *Harris v. Smith*, 2 Cold. 306; *Clement v. Reid*, 17 Miss. 535; *Rogers v. Mitchell*, 41 N. H. 154; *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133; *Philpot v. Elliott*, 4 Md. Ch. 273; *White v. R. R. Co.*, 13 Mich. 356; *Boynton v. Hazelboom*, 14 Allen, 107; 92 Am. Dec. 738; *Dom. Tel., etc., Co. v. Tel. Co.*, 89 N. J. (Eq.) 160.

Mercer v. Stark, Walk. (Miss.) 451; 12 Am. Dec. 583; *Woodcock v. Bennet*, 1 Cow. 711; 13 Am. Dec. 568; *Owning's Case*, 1 Bland, 370; 17 Am. Dec. 311; *Anderson v. Green*, 7 J. J. Marsh. 448; 23 Am. Dec. 417; *Berry v. Waring*, 1 Har. & G. 100; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Curlin v. Hendricks*, 35 Tex. 225; *Forward v. Armistead*, 12 Ala. 124; 46 Am. Dec. 246; *Taylor v. Staples*, 8 R. I. 170; 5 Am. Rep. 556; *Moon v. Crowder*, 72 Ala. 79; *Re Webb*, 49 Cal. 541; *Butman v. Porter*, 100 Mass. 337; *Burling v. King*, 66 Barb. 633; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Vassar v. Vassar*, 23 Miss. 378; *Hickman v. Grimes*, 1 A. K. Marsh. 86; 10 Am.

Dec. 714; *Shackelford v. Handley*, 1 A. K. Marsh. 496; 10 Am. Dec. 753.

² See *ante*, § 93, 94.

³ *Seymour v. Delancy*, 3 Cow. 445; 15 Am. Dec. 270; *Coles v. Trecotheek*, 9 Ves. 246; *Davidson v. Little*, 22 Pa. St. 345; 60 Am. Dec. 81; *Hale v. Wilkinson*, 21 Gra. t. 75; *Parmelee v. Cameron*, 41 N. Y. 392; *Western R. R. Co. v. Babcock*, 6 Met. 337; *Bean v. Valle*, 2 Mo. 126; *Losee v. Morey*, 57 Barb. 567; *Lee v. Kirby*, 104 Mass. 420; *Westervelt v. Mathewson*, 1 Hoff. Ch. 37; *Curlin v. Hendricks*, 35 Tex. 225; *Corraway v. Sweeney*, 24 W. Va. 643; *Holmes v. Fresh*, 9 Mo. 201.

⁴ *Viele v. R. R. Co.*, 21 Barb. 381; *Clitherrall v. Ogilvie*, 1 Desaus. Ch. 250; *In re Brady*, 66 Pa. St. 277; *Seymour v. Delancey*, 6 Johns. Ch. 222; *Fripp v. Fripp*, Rice Ch. 84; *Seymour v. Delancy*, 3 Cow. 445; 15 Am. Dec. 270; *Garnett v. Macon*, 3 Brock. 185; *Rodman v. Zillee*, 1 N. J. (Eq.) 320; *White v. Thompson*, 1 Dev. & B. 493; *Bean v. Valle*, 2 Mo. 126.

⁵ *Blanchard v. McDugal*, 6 Wis. 167; 70 Am. Dec. 438; *Huff v. Shepherd*, 58 Mo. 742; *Bell v. Bruen*, 1 How. 169; *McGuire v. Stevens*, 43 Miss. 734; 2 Am. Rep. 649; *Rankin v. Maxwell*, 2 A. K. Marsh. 488; 12 Am. Dec. 431; *Hauls v. Blackford*, 1 Dana, 1; 25 Am. Dec. 114; *Coleson v. Thompson*, 2 Wheat. 336; *Carr v. Duval*, 14 Pet. 77; *Foster v. Kimmons*, 54 Mo. 383; *Hammer v. McEldowney*, 46 Pa. St. 434; *Preston v. Preston*, 95 U. S. 300;

doubt whether the parties understood the contract alike;¹ nor unless the plaintiff establishes the fact of the contract by clear and satisfactory evidence.²

But there are certain cases where equity refuses to compel specific performance without regard to the question whether adequate relief can be obtained at law or not.³ These cases may be summarized thus:—

1. It will not decree specific performance where the agreement between the parties is not mutual, *i. e.*, in the case of a contract between A and B, equity will not order the contract to be performed by B if it should appear that if A had been the one in default it would not have been able to make a similar decree against A.⁴ Thus an infant or one who is incapable of performing the contract on his part cannot ask specific performance of it,⁵ nor will equity

Buckmaster v. Thompson, 36 N. Y. 538; *Pigg v. Corder*, 13 Leigh, 69; *Patrick v. Horton*, 3 W. Va. 23; *Robbins v. McKnight*, 5 N. J. (Eq.) 642; 45 Am. Dec. 406; *Hazelton v. Putnam*, 3 Pinn. 107; 54 Am. Dec. 158; *Hamilton v. Harvey*, 121 Ill. 469; 2 Am. St. Rep. 118; *Magee v. McManus*, 70 Cal. 553; *Higginson v. Clowes*, 15 Ves. 516; *Stanton v. Miller*, 58 N. Y. 193; *Lynes v. Hayden*, 119 Mass. 482; *Agard v. Valencia*, 39 Cal. 292; *Nichols v. Williams*, 22 N. J. (Eq.) 63; *Carr v. Passaic Co.*, 23 N. J. (Eq.) 83; *Odell v. Morin*, 5 Or. 96; *Mastin v. Halley*, 61 Mo. 196; *Long v. Duncan*, 10 Kan. 294; *Hyde v. Cooper*, 13 Rich. (Eq.) 250; *Reese v. Reese*, 41 Md. 554; *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57; *Miller v. Campbell*, 23 Ind. 125; *Wright v. Wright*, 31 Mich. 380; *Tiernan v. Gibney*, 24 Wis. 190; *Pierce v. Catron*, 23 Gratt. 588; *Jordan v. Deaton*, 23 Ark. 704.

¹ *Coles v. Bowne*, 10 Paige, 526; *Cortelyou's Appeal*, 103 Pa. St. 578.

² *Strange v. Crowley*, 91 Mo. 287; *Magee v. McManus*, 70 Cal. 553.

³ Though it is said that a party is never entitled to a decree for specific performance as a matter of right. *McComas v. Easley*, 21 Gratt. 23; *Hale v. Wilkinson*, 21 Gratt. 75; and that it is always a matter in the discretion of the

court, this discretion is nevertheless governed by strict rules and principles. Therefore, where the case meets all the conditions, and requirements for applying the remedy, the decree for specific performance is as much a matter of course as a judgment for damages at law. See *Pom. Eq. Jur.*, § 1404; *Seymour v. Delaney*, 3 Cow. 415; 15 Am. Dec. 270; *Grundy v. Edwards*, 7 J. J. Marsh. 383; 23 Am. Dec. 409; *Pigg v. Corder*, 12 Leigh. 69; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Trigg v. Read*, 5 Humph. 529; 42 Am. Dec. 447; *Young v. Daniels*, 2 Iowa, 126; 63 Am. Dec. 477; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190.

⁴ *Morgan v. Morgan*, 3 Wheat. 290; *Hawrally v. Warren*, 18 N. J. (Eq.) 124; 90 Am. Dec. 613; *Bodine v. Glading*, 21 Pa. St. 50; 59 Am. Dec. 747; *Hutchinson v. McNutt*, 1 Ohio, 14; *Benedict v. Lynch*, 4 Johns. Ch. 370; 7 Am. Dec. 484; *Marble Co. v. Ripley*, 10 Wall. 339; *Cooper v. Pena*, 21 Cal. 404; *Watts v. Kinney*, 3 Leigh, 272; 23 Am. Dec. 266; *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 186.

⁵ *McHugh v. Wells*, 39 Mich. 175; *Griffin v. Cunningham*, 19 Gratt. 571; *Tarr v. Scott*, 4 Brewst. 49.

decree specific performance where the plaintiff is insolvent or bankrupt or cannot do what he has agreed to do without a breach of trust.¹

In *Ogden v. Fossick*,² A agreed to give B a lease of certain premises of which A was to be employed by B as manager during the term. It was held that the court would not order the performance of A's agreement, because it could not enforce B's promise to employ A.³

An apparent exception to this rule arises where a plaintiff asks for specific performance of an agreement under the statute of frauds signed only by the defendant and hence not binding on the plaintiff if he had been sued on it.⁴ But a decree in such a case is supported on the ground that the plaintiff by filing his bill for relief has admitted the claim to be legal and has made the remedy mutual.⁵

2. It will not decree specific performance where it would operate unreasonably hard on the defendant,⁶ or where the agreement itself is unreasonable,⁷ or where its decree would produce injustice or would be inequitable under all the circumstances.⁸

3. It will not decree performance where it has no capacity to insure the performance. This rule illustrates the distinction between lands and chattels. An agreement for the purchase of land can be performed by the doing of a specific act, the execution of a deed or conveyance. In a

¹ *Lowes v. Lush*, 14 Ves. 547; see *McFarlane v. Williams*, 107 Ill. 23; *Tolson v. Sheard*, L. R. 5 Ch. Div. 19.

² 32 L. J. Ch. 78.

³ And see *Blackett v. Bates*, L. R. 1 Ch. 125; *Brick v. Smith*, 27 Mich. 166; 18 Am. Rep. 84.

⁴ See *ante*, § 69, 84.

⁵ *Martin v. Mitchell*, 2 J. & W. 426; *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 501.

⁶ *Johnson v. Hubbell*, 10 N. J. (Eq.) 332; 66 Am. Dec. 773; *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44; *Bryan*

Loftus, 1 Rob. (Va.) 12; 30 Am. Dec. 343; *Coe v. R. R. Co.*, 31 N. J. (Eq.) 106; *Weise's Appeal*, 72 Pa. St. 351; *Marble Co. v. Ripley*, 10 Wall. 329; *Cathcart v. Robinson*, 5 Pet. 263; *Canady v. Shepherd*, 2 Jones (Eq.), 234; *Tobey v. Bristol*, 3 Story, 800; *Staines v. Newson*, 1 Tenn. Ch. 244; *Barnett v. Spratt*, 4 Ired. Eq. 171.

⁷ *Higgins v. Butler*, 78 Me. 520.

⁸ *Margraf v. Muir*, 57 N. Y. 155; *Chicago, etc., R. Co. v. Schoenman*, 90 Ill. 258.

contract for the sale and delivery of goods performance may extend over some time and involve the fulfillment of various terms, and "the court acts only where it can perform the very thing in the terms specifically agreed upon."¹ Therefore specific performance will not be decreed of a contract requiring the direct superintendence of the court, nor where the contract or duties to be performed are continuous;² as, for example, an agreement to erect a building;³ or to construct a railroad;⁴ or a covenant to repair;⁵ or an agreement to do work and labor of any kind.⁶ And for a like reason it will refuse to grant specific performance of contracts involving personal services.⁷

On this ground it will not decree specific performance where the decree would be nugatory or useless.⁸ The court will not enforce an agreement which is revocable or only to be performed at the option of the defendant, for its interference in such case would be idle, since what it had done might be instantly undone by the party.⁹ In *Rust v. Conrad*,¹⁰ the court say: "The court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is

¹ *Wolverhampton R. Co. v. L. & N. W. R. Co.*, L. R. 16 (Eq.) 489.

² *Danforth v. R. R. Co.*, 30 N. J. (Eq.) 13.

³ *Fallon v. R. R. Co.*, 1 Dill. 121; *Gray v. Hawkins*, 8 Ohio St. 449; 72 Am. Dec. 600; *Rose v. R. R. Co.*, 1 Woolw. 28.

⁴ *Fallon v. R. R. Co.*, *supra*; *McCann v. R. R. Co.*, 2 Tenn. Ch. 173; *Oregonian R. R. Co. v. Oreg. Nav. Co.*, 11 Sawy. 53.

⁵ *Beck v. Allison*, 56 N. Y. 366; 15 A. R. 430.

⁶ *Marble Co. v. Ripley*, 10 Wall. 339; *Blanchard v. R. Co.*, 31 Mich. 43; 18 Am. Rep. 142.

⁷ *Willingham v. Hooven*, 74 Ga. 233;

58 Am. Rep. 435; *Clark's Case*, 1 Blackf. 122; 12 Am. Dec. 213; *De Rivaoli v. Corsetti*, 4 Paige, 264; 25 Am. Dec. 532; *Hamblin v. Durneford*, 3 Edw. Ch. 529; *Haight v. Badgely*, 15 Barb. 501; *Randall v. Latham*, 36 Conn. 48; *Richmond v. R. R. Co.*, 33 Iowa, 423; *Ford v. Jermon*, 6 Phila. 6; *Marble Co. v. Ripley*, 10 Wall. 339; *Cooper v. Pence*, 21 Cal. 404.

⁸ *Webb v. Conn.*, 1 Litt. 82; 13 Am. Dec. 225.

⁹ *Express Co. v. R. R. Co.*, 99 U. S. 191; *Marble Co. v. Ripley*, 10 Wall. 339; *Barker v. Critzer*, 35 Kan. 459; *Sturgis v. Galindo*, 59 Cal. 23; 43 Am. Rep. 229.

¹⁰ 47 Mich. 449; 41 Am. Rep. 730.

sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense, of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. A familiar instance is that of a contract for the formation of a partnership, which, though it is within the power of the court to enforce it, and it may be done under special circumstances, when by its terms the partnership is to continue for a definite period, yet, in the absence of a provision to that effect, performance will invariably be refused, though the terms may be in all respects equal, fair, and legal.¹ The reason is, that the partnership which the court might establish by its decree, the parties, or either of them, might immediately dissolve."

And specific performance of a contract will not be decreed where performance is obviously impossible;² as, for example, where a vendor whom it is sought to compel to convey the land contracted for, has no title,³ or cannot obtain a title to the land.⁴ In *Huguenin v. Courtenay*,⁵ A agreed to sell to B a leasehold interest. Before the time for B's entry arrived, a part of the land was carried away by the sea. It was held that A could not compel specific performance of the contract.

4. It will not decree specific performance where the plaintiff has himself broken the contract or has made a material default in performance on his part,⁶ for it is required that the

¹ *Hercy v. Birch*, 9 Ves. 357; *Meason v. Kaine*, 63 Pa. St. 335.

² *Paok v. Gaither*, 73 N. C. 95; *Snell v. Mitchell*, 65 Me. 48; *In re Burk*, 75 Pa. St. 141; 15 Am. Rep. 587.

³ *Fitzpatrick v. Featherstone*, 3 Ala. 40; *Stevenson v. Buxton*, 15 Abb. Pr. 352; *Nicol v. Carr*, 35 Pa. St. 381.

⁴ *Love v. Camp*, 6 Fred. Eq. 209; 51 Am. Dec. 419; *McQueen v. Chouteau*, 20 Mo. 222; 64 Am. Dec. 178; *Gupton v. Gupton*, 47 Mo. 47; *Brewer v. Wall*, 23 Tex. 585; 76 Am. Dec. 76. If a husband

agrees to procure his wife to join with him in a conveyance of her land, and the wife refuses to do so, a court of equity will not decree a specific performance. 1 *Maddock's Chancery Practice*, 339; *Sugden on Vendors*, 151.

⁵ 21 S. C. 408; 53 Am. Rep. 688.

⁶ *Pearis v. Oovillaud*, 6 Cal. 617; 65 Am. Dec. 543; *Johnston v. Mitchell*, 1 A. K. Marsh. 2357; 10 Am. Dec. 727; *Moore v. Skidmore*, Litt. Sel. Cas. 453; 12 Am. Dec. 333; *Breckenridge v. Clinkinbeard*, 2 Litt. 127; 13 Am. Dec. 261; *Tiernan v.*

plaintiff shall show performance, or readiness to perform, himself before he can ask the aid of the court against the other party.¹ Nevertheless specific performance may be decreed against a purchaser with compensation for an inconsiderable part of the subject of sale which the vendor is unable to convey,² provided the deficiency is small, and not material to the enjoyment of the rest.³ And a purchaser is entitled to specific performance against the vendor, so far as the latter may be able to complete the contract, with compensation for any deficiency.⁴ In general the purchaser is entitled to take, if he pleases, performance with a defect, which the vendor would not be able to enforce against him.

§ 473. **Specific Performance Decreed Only Where Damages Are Inadequate Remedy.**—Subject to the rules given in the last section, the principle upon which equity jurisdiction is based, as already stated, is the absence of any adequate remedy at law.⁵ This is illustrated by the differ-

Beam, 2 Ohio, 333; 15 Am. Dec. 557; Wells v. Smith, 7 Paige, 22; 31 Am. Dec. 275; Rogers v. Saunders, 18 Me. 92; 33 Am. Dec. 635; Lewis v. Woods, 4 How. (Miss.) 86; 34 Am. Dec. 110; Hoen v. Simmons, 1 Cal. 119; 52 Am. Dec. 291; Kirby v. Harrison, 2 Ohio St. 326; 59 Am. Dec. 677; Smith v. Sturges, 65 How. Pr. 360; Brown v. Hayes, 33 Ga. 136; Bowman v. Irons, 3 Bibb, 78; 4 Am. Dec. 626; Ramsay v. Brailsford, 3 Dessau. Ch. 582; 3 Am. Dec. 698.

¹ Boone v. Iron Co., 19 How. 340; Young v. Daniels, 2 Ia. 126; 63 Am. Dec. 477; Garretson v. Van Loon, 3 G. Greene, 128; 54 Am. Dec. 492; Choss' Appeal, 4 Pa. St. 92; 45 Am. 668; Green v. Covilland, 10 Cal. 317; 70 Am. Dec. 725; Rogers v. Saunders, 18 Me. 73; 33 Am. Dec. 635; Tyler v. McCardle, 17 Miss. 220.

² McQueen v. Farquhar, 11 Ves. 467; Stoddard v. Smith, 5 Binn. 335; Foley v. Crow, 37 Md. 51; Evans v. Kingsberry, 2 Rand. 120; 14 Am. Dec. 779; King v. Bardeau, 6 John. Ch. 38; 10 Am. Dec. 312.

³ McKean v. Read, Litt. Sel. Cas. 386;

12 Am. Dec. 318; Perkins v. Ede, 16 Beav. 123; Knatchbull v. Grueber, 1 Madd. 153; Howard v. Kimball, 35 N. O. 175; 6 Am. Rep. 739; Taylor v. Williams, 45 Mo. 80; Holland v. Holmes, 14 Fla. 390; Havens v. Bliss, 25 N. J. Eq. 363; Bogan v. Drangbrill, 51 Ala. 312; Smith v. Turner, 50 Ind. 367; Botsford v. Wilson, 67 Ill. 132; Gregory v. Perkins, 40 Iowa, 82; Walsh v. Barton, 24 Ohio St. 28.

⁴ Walling v. Kinnard, 10 Tex. 508; 60 Am. Dec. 216; Harbers v. Gadsden, 6 Rich. Eq. 284; 63 Am. Dec. 390; Tonn v. Ticknor, 112 Ill. 217; Stockton v. Union, Oil Co., 4 W. Va. 273.

⁵ See ante, § 472. Willard v. Taylor, 8 Wall. 557; Morgan v. Morgan, 3 Stew. 383; 21 Am. Dec. 638; Hays v. Hall, 4 Port. 374; 30 Am. Dec. 531; Buck v. Swazey, 35 Me. 41; 56 Am. Dec. 681; Wynn v. Garland, 19 Ark. 23; 68 Am. Dec. 190; Grassmeyer v. Beeson, 18 Tex. 753; 70 Am. Dec. 309; Peters v. Phillips, 19 Tex. 70; 70 Am. Dec. 319; Jones v. Newhall, 115 Mass. 244; 15 Am. Rep. 67.

ent views which courts of equity take of contracts for the sale of land and contracts for the sale of goods. The objects with which a man purchases a particular piece of land are different to those with which he purchases goods. He may be determined, in making the contract, by the merits of the site or its neighborhood, and these cannot be represented by a money compensation; whereas goods of the kind and quality that he wants are generally to be purchased. Hence specific performance of a contract for the sale of goods is only decreed in very rare cases, while land or any interest in land is always the subject of equity jurisdiction of this kind; and it must be borne in mind, in making this distinction, that the performance is decreed in the one case and refused in the other not upon any distinction between realty and personalty but because damages in the one case may not, in the other usually will, afford a complete remedy.

§ 474. **Contracts for the Sale of Lands.**—For the reason given in the last section contracts for interests in or for the sale of lands are a proper subject for specific performance, even though the plaintiff may have a remedy at law for the purchase money which he has paid over or for damages generally for the injury he has sustained.¹

§ 475. **Effect of the Statute of Frauds.** — We have seen that an unwritten contract for the sale of land

¹ Willard v. Tayloe, 8 Wall. 537, Barnes v. Barnes, 85 N. O. 251; Bogan v. Drayhill, 51 Ala. 312; Duff v. Fisher, 15 Cal. 375; McGarvey v. Hall, 23 Cal. 140; Richmond v. R. R. Co., 33 Iowa, 422; Blanchard v. R. R. Co., 31 Mich. 43; 18 Am. Rep. 142; Ewins v. Gordon, 49 N. H. 444; Hart v. Brand, 1 A. K. Marsh. 159; 10 Am. Dec. 715; Sproule v. Winant, 7 T. B. Mon. 195; 18 Am. Dec. 165; Phyle v. Wardoll, 5 Paige, 288; 28 Am. Dec. 430; Springs v. Sanders, Phill. Eq. 67; Finley v. Aiken, 1 Grant Cas. 83; Larison v. Burt, 4 Watts & S. 27. And the court's jurisdiction extends even to lands

which are out of its jurisdiction or in another country if the parties are within it. Equity acts *in personam*; Penn v. Lord Baltimore, 2 Vern. 444; 2 White and Tudor's Lead. Cas. 837; Toller v. Carteret, 2 Vern. 495; Sutphen v. Fowler, 9 Paige, 280; Brown v. Desmond, 100 Mass. 267; Ward v. Arredondo, 1 Hopk. Ch. 218; 14 Am. Dec. 543; Mitchell v. Bunch, 2 Paige, 606; 22 Am. Dec. 669; Newton v. Robinson, 13 N. Y. 567; 67 Am. Dec. 89; Johnson v. Kimbro, 3 Head, 557; 75 Am. Dec. 781; Gardner v. Ogden, 23 N. Y. 327; 78 Am. Dec. 192.

is unenforceable in courts of law;¹ and the statute binds courts of equity as well.² Nevertheless, a court of equity will decree a specific performance of an oral contract within the statute, where there have been such acts of performance by the party asking relief that he would suffer an injury amounting to a fraud if the other party should not perform his part of the contract.³ In such cases the court, having general jurisdiction to relieve against fraud, applies the remedy by enforcing the contract, not because the contract, as such, is binding on the parties, but because the enforcement thereof is the most effectual way to prevent the perpetration of a fraud.⁴

Payment of the purchase money is not such "part performance" as will take the case out of the statute.⁵ Nor

¹ *Ante*, § 78.

² *Patterson v. Yeaton*, 47 Me. 306; *Skipwith v. Dodd*, 24 Miss. 487; *Abel v. Caldermore*, 4 Cal. 90.

³ 8 *Pomeroy's Eq. Jur.*, § 1409; *Overstreet v. Rice*, 4 Bush. 1; 96 Am. Dec. 279; *Somerville v. Trueman*, 4 Har. & McH. 43; 1 Am. Dec. 389; *Simmons v. Hall*, 4 Har. & McH. 252; 1 Am. Dec. 398; *Wetmore v. White*, 2 Caines Cas. 87; 2 Am. Dec. 523; *Parkhurst v. Van Cortland*, 14 Johns. 15; 7 Am. Dec. 427; *Glass v. Hulburt*, 102 Mass. 35; 3 Am. Rep. 418; *Weed v. Terry*, 2 Doug. (Mich.) 314; 45 Am. Dec. 257; *Robbins v. McKnight*, 5 N. J. (Eq.) 642; 45 Am. Dec. 406; *Neale v. Neale*, 9 Wall. 1; *Printup v. Mitchell*, 17 Ga. 556; 63 Am. Dec. 258; *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Bigelow v. Armes*, 108 U. S. 10; *Ryan v. Dox*, 34 N. Y. 307; 98 Am. Dec. 696. The rule is otherwise in Mississippi, North Carolina and Tennessee. *Box v. Stanford*, 13 Smedes & M. 93; 51 Am. Dec. 142; *Dunn v. Moore*, 3 Ired. (Eq.) 364; *Ridley v. McNary*, 2 Humph. 174.

⁴ *Benj. Prin. of Contr.* 48, citing *Jacobs v. R. B. Co.*, 8 Cush. 225; *Wheeler v. Reynolds*, 66 N. Y. 237.

⁵ *Johnston v. Glancy*, 4 Blackf. 94; 23 Am. Dec. 45; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458;

Cronk v. Trumble, 66 Ill. 428; *Poland v. O'Connor*, 1 Neb. 50; 93 Am. Dec. 337; *Parke v. Leewright*, 20 Mo. 85; *Eaton v. Whittaker*, 18 Conn. 223; 44 Am. Dec. 586; *Oole v. Potts*, 10 N. J. (Eq.) 67; *Gangwer v. Fry*, 17 Pa. St. 491; 55 Am. Dec. 578; *Rankin v. Simpson*, 23 N. J. (L.) 471; 57 Am. Dec. 668; *Jackson v. Outright*, 5 Munf. 306; *Hyde v. Cooper*, 13 S. C. (Eq.) 250; *Gorham v. Dodge*, 122 Ill. 528; *Horn v. Ludington*, 13 Wis. 73; *Underhill v. Allen*, 18 Ark. 466; *Thompson v. Gould*, 20 Pick. 134; *Glass v. Hulburt*, 102 Mass. 24; 3 Am. Rep. 418. In the earliest cases it was held that the payment of a considerable portion of the purchase price would take a verbal contract for the sale of land out of the operation of the statute, while the payment of a small portion would not have that effect. *Lacon v. Mertkins*, 3 Atk. 4, per Lord Hardwicke, who held generally that part payment was a good part performance. *Child v. Comber*, 3 Swanst. 423, note; *Owen v. Davies*, 1 Ves. Sr. 82; *Hales v. Van Berchem*, 2 Vern. 618; *Skett v. Whitmore*, *Freem. Ch.* 281; *Main v. Melbourne*, 4 Ves. 720, 724, per Lord Roslyn, who held as stated in the text. *Wetmore v. White*, 2 Cal. Cas. 87; *Townsend v. Houston*, 1 Harr. 532; 27 Am. Dec. 732; *Jones v. Peterman*, 3 Serg. & R. 543; 8 Am. Dec.

is possession taken without the consent of the vendor,¹ or not in pursuance of the contract of sale.² Nor is marriage part performance of a parol contract made in consideration of marriage.³ But possession of lands under a parol contract of sale amounts to part performance when it is connected with the contract of sale, and in consequence and pursuance of it, and was intended to be in execution of it.⁴ And so does the making of valuable and permanent improvements on the land by the purchaser.⁵

Though the statute is a good defense where specific performance of a parol contract is sought against the vendor; yet if the vendor be willing to perform, the part of the purchase money that has been paid cannot be recovered back.⁶ The statute will not prevent a decree where the

672; *Frieze v. Glenn*, 2 Md. Ch. 361; *Harwood v. Jones*, 10 Gill. & J. 404. But this distinction was long ago rejected as being based upon no sound principle. *Pomeroy's Spec. Perf.*, § 112.

¹ *Purcell v. Miner*, 4 Wall. 513; *Moore v. Higbee*, 45 Ind. 487; *Howe v. Rogers*, 32 Tex. 218; *Givens v. Calder*, 2 Dessau. Ch. 172; 2 Am. Dec. 687.

² *McNeil v. Jones*, 21 Ark. 277; *Danforth v. Laney*, 28 Ala. 274; *Charplot v. Sigerson*, 25 Mo. 68; *Cole v. Potts*, 10 N. J. (Eq.) 67; *Knoll v. Harvey*, 19 Wis. 99; *Glass v. Hulburt*, 102 Mass. 32; 3 Am. Rep. 418; *Ann Berta Lodge v. Leverton*, 42 Tex. 28; *Miller v. Ball*, 64 N. Y. 292; *Dougan v. Blocher*, 24 Pa. St., p. 34.

³ *Caton v. Caton*, L. R. 1 Ch. App. 137; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Finch v. Finch*, 10 Ohio St. 501; *Bowen v. Conger*, 8 Hun, 625; *Flenner v. Flenner*, 29 Ind. 564; *Welch v. Whelpley*, 62 Mich. 15; 4 Am. St. Rep. 810.

⁴ *Wood v. Thornby*, 58 Ill. 464; *Judy v. Gilbert*, 77 Ind. 96; 40 Am. Rep. 280; *Barnes v. R. R. Co.*, 130 Mass. 388; *Armstrong v. Kattorhorn*, 11 Ohio, 285; *Peckham v. Barker*, 8 R. I. 17; *Cole v. Potts*, 10 N. J. (Eq.) 67; *Rosenthal v. Freeberger*, 26 Md. 75; *Ham v. Goodrich*, 33 N. H. 32; *Freeman v. Freeman*, 48 N. Y. 34; 3 Am. Rep. 637; *Rankin v. Simpson*, 19 Pa. St. 471; 37 Am. Dec. 668;

Parrill v. McKinley, 9 Gratt. 1; 58 Am. Dec. 212; *Blanchard v. McDougall*, 6 Wis. 167; 70 Am. Dec. 458; *Wentworth v. Wentworth*, 3 Minn. 277; 73 Am. Dec. 97; *Workman v. Guthrie*, 29 Pa. St. 495; 72 Am. Dec. 654; *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696; *Pugh v. Good*, 3 Watts & S. 56; 37 Am. Dec. 534; *Waide v. Greenwood*, 2 Rob. (Va.) 474; 40 Am. Dec. 739; *Dugan v. Gittings*, 3 Gill. 132; 43 Am. Dec. 306; *Eaton v. Whittaker*, 18 Conn. 222; 44 Am. Dec. 586; *McMahan v. McMahan*, 13 Pa. St. 376; 53 Am. Dec. 481; *Seamen v. Ascherman*, 51 Wis. 678; 37 Am. Rep. 849; *Danforth v. Laney*, 28 Ala. 274; *Arrington v. Potter*, 47 Ala. 714; *Jefferson v. Jefferson*, 96 Ill. 551; *Anderson v. Simpson*, 31 Iowa, 899; *Rucker v. Steelman*, 73 Ind. 376; *Arnold v. Stephenson*, 79 Ind. 126; *McCarger v. Rood*, 47 Cal. 138; *Lamb v. Human*, 46 Mich. 112; *Harris v. Crenshaw*, 3 Rand. 14; *Reynolds v. Johnson*, 18 Tex. 214; *Jamison v. Dimock*, 95 Pa. St. 52.

⁵ *Glass v. Hulburt*, 102 Mass. 35; 3 Am. Rep. 418; *Moore v. Pierson*, 6 Iowa, 279; 71 Am. Dec. 409; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Blunt v. Tomlin*, 27 Ill. 93; *Moreland v. Lemasters*, 4 Blackf. 383; *Potter v. Jacobs*, 111 Mass. 32; *Hibbert v. Aylott*, 53 Tex. 530.

⁶ *Sims v. Hutchins*, 8 Sm. & M. 328; 47 Am. Dec. 90.

agreement in the bill is admitted, and the statute is not relied on as a bar.¹

§ 476. **Contracts for the Sale of Chattels.** — A court of equity will not decree a specific performance of a contract for the sale of chattels — because the breach may be sufficiently remedied by damages. If A refuses to deliver goods he has sold to B, the latter may purchase them elsewhere and recover the loss to him resulting from A's failure to perform.² This rule extends to all kinds of personal property including government bonds and the shares of stock and bonds of business corporations which are always to be bought in the market.³ But in the application of this rule three classes of cases are to be excepted, though two of them are not exceptions to but rather further illustrations of the governing principle, *viz.*, that agreements will not be specifically enforced unless from the nature of the contract, the character of the subject-matter or other special and peculiar causes, damages will not be an adequate remedy.⁴

(a) Where the contract is made under special circumstances and for purposes requiring specific performance to render it of value.⁵ As, for example, a contract for the purchase of coal-tar, solely obtainable in the city from defendant, and absolutely necessary to plaintiff's business;⁶ or for ship timber of a particular kind essential to the completion of a ship and which can be supplied by the vendor alone.⁷ Of the same nature is an agreement to furnish articles which the vendor only can supply because their

¹ *Baker v. Hollobaugh*, 15 Ark. 322; *Woods v. Dille*, 11 Ohio, 455; *Houser v. Lamont*, 55 Pa. St. 311; 93 Am. Dec. 735.

² *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404.

³ *Fallon v. R. R. Co.*, 1 Dill. 121; *Ross v. R. R. Co.*, 1 Woolw. 26; *Lowry v. Muldrow*, 8 Rich. Eq. 241; *Ferguson v. Paschall*, 11 Mo. 267; *Grain v. Stebbins*, Paige, 124; *Bissell v. Bank*, 5 McLean, 495; *Cowles v. Whitman*, 10 Conn. 131; 25 Am. Dec. 60; *Carpenter v. Ins. Co.*,

4 Sand. Ch. 408; *Foll's Appeal*, 91 Pa. St. 437; 36 Am. Rep. 671; *Strasburgh R. R. Co. v. Echternach*, 21 Pa. St. 220; 60 Am. Dec. 49; *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404.

⁴ *Adams v. Messenger*, *post*, Dilburn v. Youngblood, 85 Ala. 447.

⁵ *Clark v. Flint*, 23 Pick. 331; 33 Am. Dec. 733.

⁶ *Equitable Gas Light Co. v. Manfg. Co.*, 63 Md. 285.

⁷ *Buxton v. Lister*, 3 Atk. 383.

manufacture is guarded by a patent.¹ It is on this ground that in England and some of the States a distinction is made between government stock and the stock and bonds of railroad and business corporations, on the ground that the latter are limited in number, and cannot always be had in the market.²

(b) Articles which have acquired a peculiar value to the owner and for the loss of which no damages would compensate.³ As an artist's picture painted by himself;⁴ or a valuable picture, vase, or work of art; family pictures and furniture, or heir-looms; an antique horn, used as a symbol of tenure of land; the tobacco-box of a club; the dresses, decorations, papers, and effects of a lodge of Freemasons; a box of jewels, deeds or instruments of title to land.⁵ But it has been said,⁶ that the common law remedy "would not be considered inadequate, merely because the specific article might be more convenient or gratifying to the party than damages for withholding or destroying it; * * * and the principle must not be extended to cases founded in weakness and folly. It would therefore be a perversion of the rule to apply it to the delivery of a favorite spaniel or a lady's lap-dog."

(c) As falling under the general jurisdiction of equity to enforce trusts, if there be a trust, express or implied, the court will compel the specific performance of the contract, whether the chattels are common or special.⁷

¹ *Adams v. Messenger*, *post*; *Hapgood v. Rosenstock*, 23 Fed. Rep. 86; see *Binney v. Annan*, 107 Mass. 74; 9 Am. Rep. 10.

² *Duncuft v. Albrecht*, 12 Sim. 189; *Treasurer v. Commercial Mining Co.*, 23 Cal. 390; *Todd v. Taft*, 7 Allen, 371; *Leach v. Fobes*, 11 Gray, 506; *Frue v. Houghton*, 6 Colo. 818; *Asche v. Johnson*, 2 Jones (Eq.) 149; *Baldwin v. Com.*, 11 Bush. 417; *Adams v. Messenger*, 147 Mass. 185; 9 Am. St. Rep. 679.

³ *Adams v. Messenger*, 147 Mass. 185; 9 Am. St. Rep. 679; *McGowan v. Rem-*

ington, 12 Pa. St. 56; 51 Am. Dec. 584; *Womack v. Smith*, 11 Humph. 478; 54 Am. Dec. 51.

⁴ *Dowling v. Bettemann*, 2 J. & H. 544.

⁵ *Lawson Rights*, Rem. & Fr., § 2638; *Adams v. Messenger*, *supra*; *Williams v. Howard*, 3 Murph. 74; *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Hill v. Rockingham* 44 N. H. 457; *McGowan v. Remington*, 12 Pa. St. 56; 51 Am. Dec. 584.

⁶ *Lining v. Geddes*, 1 McCoord. Ch. 304; 16 Am. Dec. 607.

⁷ 3 Pomeroy's Eq. Jur., § 1403, note;

§ 477. **Breaches of Contract Generally.**—The remedy at law for the breach of ordinary contracts — a judgment for damages, — is sufficiently specific and adequate, and hence does not call for the equitable relief. Therefore specific performance will not be granted in such cases; as, for example, of a contract to borrow or to lend money; or of an agreement to pay a certain fund to one creditor in preference to others; or of an agreement by creditors to receive a portion of their debts in satisfaction of the whole;¹ or of a debt for work and labor; or for money payable under a building contract; or of a contract for personal services.² As put by one judge: “There is no case of a specific performance decreed of an agreement to build a house, because if A will not do it, B may. A specific performance is only decreed where the party wants the thing in specie and cannot have it in any other way.”³

§ 478. **Performance Compelled by Means of Injunction.** — Whatever promise or covenant a court of equity will compel a man to perform, by a decree for specific performance, it will generally restrain him from neglecting to perform, by injunction.⁴ A promise or covenant, it is obvious, may be either that one will do a certain thing or that one will not do it; in the one case an (a) *affirmative*, in the other a (b) *negative*, promise or covenant.

(a) The remedy in equity in the first case is usually by a bill for specific performance, as we have seen. Yet the court will in some cases enforce indirectly the affirmative terms of a contract of which it could not directly decree the specific performance, and this by means of a manda-

McGowin v. Remington, 13 Pa. St. 56; 51 Am. Dec. 584; Abbott v. Reeves, 49 Pa. St. 491; 88 Am. Dec. 616; Peer v. Kean, 14 Mich. 384; Hill v. Bank, 44 N. H. 567; Kimball v. Morton, 5 N. J. (Eq.) 26; 48 Am. Dec. 621.

¹ Lawson Rights, Rem. & Pr. 2588.

² See *ante*, § 473.

³ Kenyon, M. R., in *Errington v. Aynesley*, 2 Brown Ch. 343. Some of the cases fall also under another rule, viz., that the court will not undertake to direct a continuous service; see *ante*.

⁴ Snell Eq. 488.

tory injunction.¹ Thus an agreement to remove certain buildings has been enforced by an injunction against the continuance of the buildings,² and lessors who had covenanted to manage land or cultivate a farm in a husbandlike manner, have been restrained from doing acts of bad husbandry, although there was no express covenant to refrain from such acts.³

(b) Where a person agrees not to do a certain act, specific performance is decreed in the form of an injunction restraining the party from doing the act.⁴ Thus injunctions have been issued to restrain a person from violating a promise not to engage in a certain trade for a certain term;⁵ to restrain a person who had entered into a covenant not to ring church bells from so doing;⁶ to restrain an author who on the sale of a work had covenanted with the purchaser not to do anything which might be detrimental to the sale or publication of that work, from publishing a rival work on the same subject;⁷ to restrain tenants from violating covenants in their leases as to the mode of cultivation, or the use of the premises;⁸ to restrain the erection of buildings beyond a certain height;⁹ to restrain the erection or compel the removal of bay-windows;¹⁰ to restrain the use

¹ *Leake Contr.* 1120; *Lane v. Newdegate*, 10 Ves. 192; *Isenberg v. East India House Co.*, 3 De G. J. & S. 272.

² *Ranken v. Huskinson*, 4 Sim. 13; *Lord Manners v. Johnson*, L. R. 1 Ch. Div. 673.

³ *Drury v. Molins*, 6 Ves. 328; *Pratt v. Brett*, 2 Madd. 62; *Briggs v. Law*, 4 Johns. Ch. 23; *Kerr on Injunctions*, 522.

⁴ *Banet v. Blagrove*, 5 Vesey, 555; 6 Ves. 104; *Hapgood v. Rosenstock*, 23 Fed. Rep. 86; *Steward v. Winters*, 4 Sandf. Ch. 567.

⁵ See *ante*, § 324; *Doty v. Martin*, 32 Mich. 462; *Butler v. Bruleson*, 16 Vt. 176; *Guerand v. Dandalet*, 32 Md. 561; 3 Am. Rep. 164.

⁶ *Martin v. Nutkin*, 2 P. Wms. 266.

⁷ *Barfield v. Nicholson*, 3 Sim. & Stu. 1.

⁸ *Flemming v. Snook*, 5 Beav. 250; *Grey de Wilton v. Saxon*, 6 Ves. 106;

Pulteney v. Shelton, 5 Ves. 260; *Hamilton v. Dunsford*, 6 Irish Ch. 412; *Maddox v. White*, 4 Md. 72; 59 Am. Dec. 67; *Wilds v. Layton*, 1 Del. Ch. 226; 12 Am. Dec. 91; *Frank v. Brunneman*, 8 W. Va. 482; *Gillilan v. Norton*, 6 Robt. 546; *Douglas v. Wiggins*, 1 Johns. Ch. 435; *Jungerman v. Bovee*, 19 Cal. 264; *Baigher v. Crane*, 27 Md. 36; *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. 212; *Barrow v. Richard*, 8 Paige, 357; *Sawyer v. Twiss*, 26 N. H. 345; *Middlebrook v. Corwin*, 15 Wend. 167; *Daniels v. Pond*, 21 Pick. 367; *Sutton v. Head*, 36 Ky. 156; 29 Am. St. Rep. 156; *Hodge v. Sloan*, 107 N. Y. 244.

⁹ *Lloyd v. London, etc. R. Co.*, 2 De G. J. & Sm. 568.

¹⁰ *Lord Manners v. Johnson*, L. R. 1 Ch. Div. 673; *Western v. Macdermot*, L. R. 1 Eq. 499.

of building lots except for the erection of dwellings;¹ to restrain the carrying on of particular trades in demised premises;² and in many other cases of a similar character.³

And it is now well settled⁴ that the inability of a court of equity to compel the specific performance of one part of an agreement is no ground for its refusing to enjoin against the breach of another part of the same agreement.⁵ In *Lumley v. Wagner*,⁶ the defendant agreed with the plaintiff to sing at his theater upon certain terms, and during a certain period to sing nowhere else. Subsequently she entered into an engagement with another person to sing at another theater, and refused to perform her contract with the plaintiff. The court, while admitting that it was powerless to enforce so much of the contract as related to the promise to sing at the plaintiff's theater, restrained the defendant by injunction from performing at any other theater.

¹ *St. Andrew's Church Appeal*, 67 Pa. St. 512.

² *Kemp v. Sober*, 1 Sim. N. S. 517; *Hodson v. Coppard*, 29 Beav. 4; *Clements v. Wells*, L. R. 1 Eq. 200; *Parker v. Whyte*, 1 Hem. & M. 167.

³ *Kerr on Injunctions*, 508; *Wolverhampton, etc., R. Co. v. London, etc., R. Co.*, L. R. 16 Eq. 433; *Nuneaton Local Board v. General Sewage Co.*, L. R. 20 Eq. 127; *Parkham v. Alcardi*, 34 Ala. 373; *Lewis v. Lyman*, 22 Pick. 437; *Lewis v. Jones*, 17 Pa. St. 263; *Beckwith v. Howard*, 6 R. I. 1; *Avery v. Baker*, 27 Neb. 388; 20 Am. St. Rep. 672.

⁴ In the earlier cases equity would not restrain the violation of the negative part of an agreement when it could not enforce the affirmative stipulations, but the party was left to his remedy at law. *Kemble v. Kean*, 6 Sim. R. 333; *Hamblin v. Dunneford*, 2 Ed. 525; *Burton v. Marshall*, 4 Gill, 487; *Sanquirico v. Benedictti*, 1 Barb. 315.

⁵ *Hays v. Willis*, 11 Abb. Pr. (N.S.) 167; *Daly v. Smith*, 49 How. Pr. 150; 33 N. Y.

(S. C.) 158; *Morris v. Coleman*, 18 Vesey, 437; *Richardson v. Peacock*, 28 N. J. (Eq.) 40; *Frank v. Brunneman*, 8 W. Va. 462; *Parker v. Gaulson*, 61 Ill. 250; *Gillis v. Hall*, 3 Brewst. 342; *Chicago, etc., R. Co. v. New York, etc., Co.*, 24 Fed. R. 521; *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 18 Ohio St. 550; *Marble Co. v. Ripley*, 10 Wall. 358.

⁶ 1 De. G. M. & G. 604. The court will not enforce the performance of ordinary contracts of service in this way; it is only where the service is to be rendered by one having special and extraordinary qualifications; as "for example, by an eminent actor, singer, artist and the like * * * Damages for a breach of such contracts are not only difficult to ascertain but cannot with any certainty be estimated; nor could the plaintiff procure by means of damages the same services in the labor market, as in case of an ordinary contract of employment between a artisan, a laborer or a clerk and their employer." *Cort v. Lassard*, 18 Oreg. 221; 17 Am. St. Rep. 726.

CHAPTER XIX.

DISCHARGE OF RIGHT OF ACTION.

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482. Accord and satisfaction defined and explained.

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484. Introductory.

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2. *Under Statute of Limitations.*

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§ 479. Introductory. — Upon every breach of contract, whether it discharges or not the agreement of the other party,¹ there arises in favor of the injured party a right of action for compensation. This right of action cannot be discharged by any payment or performance, or tender of payment or performance by the promisor, without the consent and acceptance of the promisee; for the promisee, after breach, becomes entitled to the compensation or remedy provided by process of law, and is not

¹ See *ante*, § 438.

bound to accept any tender or offer made in satisfaction of his legal rights.¹

The question then to be considered in this chapter is, how may this Right of Action be discharged; and it is answered that the right of action arising from a breach of a contract may be discharged in four ways: (a) by a release, (b) by an accord and satisfaction, (c) by a judgment, (d) by lapse of time.

(a) *Release.*

§ 480. **Release Defined and Explained.**—Release is a discharge of the claim or right of action growing out of the breach of an agreement.² It must, unless it be made for some new consideration, be under seal³ to bind the person making it, otherwise it will be nothing more than a promise without consideration to forbear from the exercise of a right, which we have seen is not binding.⁴ The release of a debt discharges all securities held by the creditor,⁵ but does not extinguish or defeat any future rights or claims,⁶ and a general release is qualified and controlled by a recital of the particular class of debts to which alone it is intended to apply.⁷

A voluntary delivery by the creditor to the debtor of the evidence of the debt, as a bill, note or bond, or the destroying of the instrument, with the intention of discharging the debt, operates as a release.⁸

A release of one of several debtors jointly, or jointly and severally, liable for the same debt, releases all.⁹ The

¹ Lawson Rights, Rem. & Pr., § 2567.

² Leake Contr. 1261.

³ Ill. Cent. R. Co. v. Read, 37 Ill. 484; 37 Am. Dec. 290; Weber v. Couch, 184 Mass. 26; 45 Am. Rep. 274; Smithwick v. Ward, 7 Jones, 64; 75 Am. Dec. 453.

⁴ Ante, § 99.

⁵ Cowper v. Green, 7 Mees. & W. 633; Jackson v. Stackhouse, 1 Cow. 122; 13 Am. Dec. 514.

⁶ Francis v. Boston and Roxbury

Mill Corporation, 4 Pick. 365, 368; Hastings v. Dickinson, 7 Mass. 183; 5 Am. Dec. 34; Gibson v. Gibson, 15 Mass. 106; 8 Am. Dec. 94; Quarles v. Quarles, 4 Mass. 688; Cooke v. Stuart, Peck, 137.

⁷ Lawson Rights, Rem. & Pr. § 2576.

⁸ Gardner v. Gardner, 23 Wend. 526; 34 Am. Dec. 340; Beach v. Enders, 51 Barb. 570.

⁹ Baldwin v. Gray, 4 Martin (N. S.), 192; 16 Am. Dec. 169; Allin v. Shadburne,

reason for this is that if it did not have this effect the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released.¹ But a release of one co-debtor may reserve a right against the other debtors, in which case they are not discharged.² So the release by one of several co-creditors jointly entitled to the debt discharges the debtor as to all.³

§ 481. **Covenant Not to Sue.**—A covenant made by a creditor with his debtor not to sue him at any time for the debt, although it does not in terms release the debtor, and purports only to bind the creditor by covenant, is upon the principle of avoiding circuitry of action, equivalent to a release, and may be so pleaded in an action by the creditor for the debt, the subject of the covenant.⁴ But a covenant not to sue one of several co-debtors jointly, or jointly and severally, liable, although it operates by construction as a release as between the covenantor and covenantee, does not operate as a release of the other debtors.⁵

(b) *Accord and Satisfaction.*

§ 482. **Accord and Satisfaction Defined and Explained.**—An accord and satisfaction is an agreement by the creditor to accept something in satisfaction of his claim, accompanied by the delivery or performance of what is so

1 Dana, 68; 25 Am. Dec. 121; Berry v. Gillis, 17 N. H. 9; 43 Am. Dec. 585; Bozeman v. State Bank, 7 Ark. 328; 46 Am. Dec. 291; Williamson v. McGinness, 11 B. Mon. 74; 52 Am. Dec. 561; Hale v. Spaulding, 145 Mass. 482; 1 Am. St. Rep. 475; Benjamin v. McConnell, 4 Gilm. 536; 46 Am. Dec. 474.

2 North v. Wakefield, 13 Q. B. 451.

3 Yates v. Donaldson, 5 Md. 389; 61 Am. Dec. 288.

4 Leake Contr. 932; Beltzhoover v. Stockton, 4 Cranch C. C. 695; Myrick v. Dame, 9 Cush. 248.

5 Russell v. Adderton, 64 N. C. 417; Cuyler v. Cuyler, 2 Johns. 186. But it is different where the covenant is not to sue for a limited time only. Ayloff v. Scrimpsire, 2 Salk. 523; Clopper v. Union Bank, 7 Har. & J. 92; 16 Am. Dec. 294; Ford v. Beech, 11 Q. B. 532.

6 Goodnow v. Smith, 18 Pick. 414; 29 Am. Dec. 600; Berry v. Dillis, 17 N. H. 9; 43 Am. Dec. 585; Bozeman v. State Bank, 7 Ark. 328; 46 Am. Dec. 291; Williamson v. Ginness, 11 B. Mon. 74; 52 Am. Dec. 561; Brown v. White, 29 N. J. (L.) 514; 80 Am. Dec. 226.

agreed upon.¹ But it must be borne in mind that there must be both accord *and* satisfaction. By the accord the parties agree upon a sum of money, or other matter, to be given and accepted as compensation for the breach, instead of the legal remedy provided by process of law. But this is insufficient to bar an action.² It is by the execution of the accord, that is, by the actual delivery and acceptance of the matter agreed upon as a satisfaction, that the right of action is discharged.³ As said in an old case, “*accord executed* is satisfaction; *accord executory* is only substituting one cause of action for another, which might go on to any extent.”⁴ Therefore readiness to perform the accord,⁵ or a tender of performance,⁶ or even part performance,⁷ is not enough.

The satisfaction may consist in the acquisition of a new right against the debtor, as, for example, the receipt from him of a negotiable instrument as payment,⁸ or of new

¹ Pulliam v. Taylor, 50 Miss. 251; Bull v. Bull, 43 Conn. 455; Stockton v. Frey, 4 Gill, 406; 45 Am. Dec. 133; Helrn v. Carron, 11 Sm. & M. 381; 49 Am. Dec. 65.

² Ballard v. Nokes, 2 Ark. 45; Rising v. Cummings, 47 Vt. 345; Piper v. Kingsbury, 48 Vt. 490; McKean v. Reed, Litt. Sel. Cas. 385; 13 Am. Dec. 318; Noe v. Christie, 51 N. Y. 272; Kromer v. Helm, 75 N. Y. 577; 31 Am. Rep. 491; Mitchell v. Hawley, 4 Denio, 414; 47 Am. Dec. 280; Ogilvie v. Hallam, 58 Ia. 714; Russell v. Lytle, 6 Wend. 390; 22 Am. Dec. 537; Daniels v. Hollenbeck, 19 Wend. 408; Frost v. Johnson, 8 Ohio, 393; Ellis v. Bitzer, 2 Ohio, 89; 15 Am. Dec. 534; Schlitz v. Meyer, 61 Wis. 418; Troutmann v. Lucas, 63 Ga. 466; Pettis v. Ray, 12 R. I. 344; Summers v. Hamilton, 56 Cal. 593; Browning v. Crouse, 43 Mich. 489; Lankton v. Stewart, 27 Minn. 346; Johnson v. Hunt, 81 Ky. 321; Hemmingway v. Stansell, 106 U. S. 399; Costello v. Cady, 103 Mass. 149; Memphis v. Brown, 20 Wall. 308; Petty v. Allen, 184 Mass. 265.

³ Diller v. Brubaker, 52 Pa. St. 498; 91 Am. Dec. 177; Barnes v. Lloyd, 2 Miss.

584; Willey v. Warden, 27 Vt. 635; Vedder v. Vedder, 1 Denio. 257; Hall v. Smith, 10 Iowa, 45; Flack v. Garland, 8 Md. 188; Brooklyn Bank v. De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Frost v. Johnson, 8 Ohio, 393; Colt v. Houston, 3 Johns. Cas. 243; Watkinson v. Inglesby, 5 Johns. 386; Russell v. Lytle, 6 Wend. 390; 22 Am. Dec. 537; Childs v. Millville, etc., Ins. Co. 56 Vt. 609. But see Whitsett v. Clayton, 5 Colo. 476 where this well established doctrine is criticised.

⁴ Lynn v. Bruce, 2 H. Bl. 319.

⁵ Hearn v. Kiehl, 38 Pa. St. 147; 80 Am. Dec. 472; Russell v. Lytle, 6 Wend. 390; 22 Am. Dec. 537.

⁶ Hearn v. Kiehl, 38 Pa. St. 147; 80 Am. Dec. 472; Brooklyn Bank v. De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Kromer v. Helm, 75 N. Y. 574; 31 Am. Rep. 491.

⁷ Hearn v. Kiehl, 38 Pa. St. 147; 80 Am. Dec. 472.

⁸ Witherby v. Mann, 11 Johns. 518; Yates v. Valentine, 71 Ill. 648; Varney v. Conery, 77 Me. 527; Bennett v. Hill, 14 R. I. 322; Mason v. Campbell, 27 Minn. 54; Guild v. Butler, 127 Mass. 336.

rights against the debtor and third parties, as in the case of a composition with creditors;¹ or of something different in kind to that which the debtor was bound by the original contract to perform;² but it must in all cases have been taken by the creditor as a full, perfect and complete *satisfaction* for his claim in order to operate as a valid discharge.³

It need not be under seal or even in writing, for a parol accord and satisfaction will discharge a right of action founded on a deed or even on a judgment,⁴ but like all other parol agreements it requires a consideration;⁵ though the consideration need not be adequate⁶ provided it is neither an illegal⁷ nor a past one.⁸

(c) *Judgment.*

§ 483. **Effect of Judgment.** — The final⁹ judgment of a court of competent jurisdiction¹⁰ in the plaintiff's favor discharges the right of action arising from breach of contract. The right is thereby *merged*¹¹ in that more solemn form of obligation sometimes called a Contract of Record.¹² It may then be discharged by payment of the judgment¹³ or by

¹ Good v. Cheesman, 2 B. & Ad. 338; Boyd v. Hind, 1 H. & N. 947; Kromer v. Helm, 75 N. Y. 577 31 Am. Rep. 471; Baxter v. Bell, 86 N. Y. 195.

² Whitney v. Cook, 53 Miss. 551; Bennett v. Hill, 14 E. I. 322; Morehouse v. Bank, 98 N. Y. 503; Williams v. Phelps, 16 Wis. 80.

³ Jones v. Fennimore, 1 G. Greene, 134; Frontress v. Markle, 2 G. Greene, 553; Clark v. Dinsmore, 5 N. H. 136; Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 551; Line v. Nelson, 38 N. J. L. 358. The debtor may attach a condition to the offer and if so the acceptance of the thing is an acceptance of the condition. Berdell v. Bissell, 6 Col. 162; McDaniels v. Bank, 29 Vt. 230; 70 Am. Dec. 406.

⁴ Cabe v. Jameson, 10 Ired. 193; 51

Am. Dec. 336; Savage v. Everman, 70 Pa. St. 315; 10 Am. Rep. 676.

⁵ See ante, Chap. IV; Consideration.

⁶ Warren v. Skinner, 20 Conn. 589; Donahoe v. Woodbury, 6 Oush. 148; Pierce v. Pierce, 25 Barb. 243; Ogborn v. Hoffman, 52 Ind. 439; Fisher v. May, 2 Bibb, 449; 5 Am. Dec. 626; Reid v. Bartlett, 19 Pick. 273.

⁷ Keeler v. Neal, 2 Watts, 424; Davis v. Noaks, 3 J. J. Marsh, 494.

⁸ See ante, § 108; Stead v. Poyer, 1 C. B. 782.

⁹ Webb v. Bucklew, 32 N. Y. 555; Livingston v. Strong, 111 Ill. 152.

¹⁰ Hickey v. Stewart, 3 How. 750.

¹¹ See ante, § 423.

¹² See ante, § 60.

¹³ Thompkins v. Bank, 53 Ill. 57; Booth v. Bank, 74 N. Y. 228.

satisfaction obtained by process of Execution.¹ On the other hand a judgment in the defendant's favor discharges the obligation by Estoppel.² The plaintiff cannot bring another action for the same cause so long as the judgment stands. But an adverse judgment, in order to discharge the obligation by estopping the plaintiff from re-asserting his claim, must have proceeded upon the merits of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator; or at a wrong time, as in the case of action brought before a condition of the contract had been fulfilled; ³ or if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is supplied in the second suit,⁴ the judgment in the first suit is not a bar to a second suit on the same cause of action.⁵

The judgment may be set aside by the court in which it is rendered or set aside or reversed by a higher court, in which case it may be entered in favor of the other party if so ordered or the parties may be remitted to their original positions.⁶

(d) *Lapse of Time.*

§ 484. **Introductory.** — The rule established by the courts, and expressly enacted by the legislature in the Statute of Limitations that lapse of time shall constitute a bar to the enforcement of a cause of action, is a rule of convenience and

¹ *Chandler v. Higgins*, 100 Ill. 602.

² *Cromwell v. Sac. Co.*, 94 U. S. 351; *Russell v. Place*, 94 U. S. 606; *Campbell v. Rankin*, 99 U. S. 261; *Patrick v. Shaffer*, 94 N. Y. 423; *Nispel v. Laparle*, 74 Ill. 306; *Marsh v. Pier*, 4 Rawle, 273; 26 Am. Dec. 131; *Norton v. Doherty*, 3 Gray, 372; 63 Am. Dec. 758.

³ *Brackett v. People*, 115 Ill. 29; *McFarlane v. Cushman*, 21 Wis. 401; *Bull v. Hopkins*, 7 Johns. 22; *Kane v. Fisher*, 2 Watts, 246.

⁴ *Gould v. R. R. Co.*, 91 U. S. 526; *Stowell v. Chamberlain*, 60 N. Y. 272.

⁵ *Knapp v. Eldridge*, 38 Kan. 106; *Moore v. Dunn*, 41 Ohio St. 62; *Lord v. Wilcox*, 99 Ind. 491; *Atkins v. Anderson*, 63 Ia. 739; *Pagels v. Oaks*, 64 Ia. 198; *Philpot v. Brown*, 16 Neb. 387; *Gage v. Ewing*, 114 Ill. 315; *Brackett v. People*, 115 Ill. 29; *Wood v. Faut*, 55 Mich. 185; *Britton v. Thornton*, 113 U. S. 526; *Pendergrass v. York Manuf. Co.*, 76 Me. 509; *Maxwell v. Clark*, 139 Mass. 112.

⁶ *Clark v. Bowen*, 23 How. 270; *Chickering v. Failes*, 29 Ill. 294; *Wadhams v. Gay*, 73 Ill. 415.

policy the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them.¹

Hence, a person who delays for an unnecessary length of time to avail himself of his legal right to enforce his action for a breach of a contract, may be met and defeated by: 1. A presumption or rule of law established by the courts independent of any statute; or, 2, the express provisions of the Statutes of Limitations.

1. *Independent of Statute.*

§ 485. **Presumption of Payment.**—Independently of the statute of limitations, or in the absence of such statutes, the law after a lapse of twenty years raises the presumption that debts generally, bonds, contracts, covenants or other obligations, have been paid or discharged.² When an action is brought on a bond or covenant for the payment of money if twenty years elapse between the time of its becoming due and of the institution of the action or proceeding, the defendant may, without pleading the statute of limitations, rely upon the presumption of payment.³ And though this presumption as to sealed instruments at least does not arise from lapse of time alone short of twenty years, yet a

¹ Foulk v. Brown, 2 Watts, 216.

² Lawson Presumptive Ev., Rule 71, p. 208; Taylor v. Dugger, 66 Ala. 444; Jefferson Co. v. Ferguson, 18 Ill. 33; Delaney v. Robinson, 2 Whart. 503; Wanmaker v. Van Buskirk, 1 Saxt. Oh. 635; 23 Am. Dec. 745; Fuhrman v. Loudon, 13 S. & R.

386; 15 Am. Dec. 606; Phillips v. Morrison 3 Bibb, 106; 6 Am. Dec. 638; Lyon v. Odell, 65 N. Y. 28.

³ Colwell v. Prindle, 19 W. Va. 640 (1882); citing Sadler v. Kennedy, 11 Id. 187; Perkins v. Hawkins, 9 Gratt. 656 Goldhawk v. Duane, 2 Wash. O. C. 323.

shorter time in connection with other circumstances may raise a presumption of fact that payment has been made.¹ And no presumption of payment or discharge can be raised by lapse of time alone for a period less than that allowed by the statute of limitations in which to bring suit.²

§ 486. *Laches in Equity.* — The courts of equity also have little sympathy with what they call stale claims,³ and considering it mischievous to encourage claims founded on transactions that had taken place long before their aid is invoked, refuse to give relief after an unreasonable length of time, the result of the delay or *laches* of the plaintiff. Thus it regards a delay in taking steps to set aside a fraudulent contract as having the effect of affirming it;⁴ though if it appear that the fraud has not during such time been known by the complainant, no length of time — even though beyond the statutory time — is allowed to be taken advantage of by those who have benefited by it.⁵ So in the exercise of the peculiar jurisdiction of equity to order the specific performance of a contract,⁶ it is well settled that the plaintiff may lose his right to ask specific performance by unnecessary delay on his part,⁷ the rule being, that if a party

¹ Brubaker v. Taylor, 76 Pa. St. 83; Ross v. Darby, 4 Munt. 428; Sadler v. Kennedy, 11 W. Va. 187; Daby v. Erickson, 45 N. Y. 786; Didlake v. Robb, 1 Woods, 632; Stockton v. Johnson, 8 B. Mon. 408; Garnier v. Renner, 51 Ind. 374.

² Grafton Bk. v. Doe, 19 Vt. 467; 47 Am. Dec. 697; Ingraham v. Baldwin, 9 N. Y. 45. But in connection with other circumstances a jury may presume payment from a less time. Milledge v. Gardner, 33 Ga. 397; Henderson v. Lewis, 9 S. & R. 379; 11 Am. Dec. 733.

³ See Blsp. Eq., § 203; Perry v. Craig, 3 Mo. 525; Allore v. Jewell, 4 Otto, 512; Ward v. Van Bokkelen, 1 Paige, 100; Farnam v. Brooks, 9 Pick. 312.

⁴ Lawson Rights, Rem. & Pr., § 2362.

⁵ Blsp. Eq., § 203; Brown v. Norman, 66 Miss. 369; 7 Am. St. Rep. 663.

⁶ See *ante*, § 473.

⁷ Bennett v. Welch, 35 Ind. 140; 87 Am. Dec. 354; O'Fallon v. Kennerly, 45 Mo. 124; Bullock v. Adams, 20 N. J. Eq. 387; Delevan v. Duncan, 49 N. Y. 455; Warder v. Cornell, 105 Ill. 160; Davison v. Jersey Co., 71 N. Y. 333; Marshall v. Perry, 90 Ill. 289; De Cordova v. Smith, 9 Tex. 129; 58 Am. Dec. 136; Young v. McNutt, 16 Tex. 13; McAusland v. Pundt, 1 Neb. 21; 83 Am. Dec. 353; Henderson v. Hicks, 58 Cal. 364; Williams v. Hart, 116 Mass. 513; Boston, etc., R. R. Co. v. Bartlett, 10 Gray, 384; Green v. Covilland, 10 Cal. 317; 70 Am. Dec. 725; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Patterson v. Marts, 8 Watts, 374; 34 Am. Dec. 474; Johnson v. Somerville, 33 N. J. Eq. 152; Watts v. Waddle, 6 Pet. 389; Preston v. Preston, 95 U. S. 200; Smith v. Hampton, 13 Tex. 459; Campbell v. Hicks, 19 Ohio St. 433; Dubois v. Baum, 46 Pa.

seeking a specific execution of a contract has been guilty of gross laches, or if in the intermediate period there has arisen a material change of circumstances, affecting the rights, interests and obligations of the parties, a court of equity will refuse to decree a specific performance.¹

2. *Under Statute of Limitations.*

§ 487. **Statute of Limitations Bars Action.** — Theoretically a person who has a claim against another would seem to have a right to be allowed to prosecute it at any time. Nevertheless in all the States statutes are in force called Statutes of Limitations, which take away the remedy for a breach of contract or any other injury after the lapse of a certain time. And these statutes rest not so much on the actual probability that a debt which has not been claimed for a long time has been paid, and that this was the reason of the silence of the creditor, as on the inexpediency and injustice of permitting a stale and neglected claim or debt, even if it has not been paid, to be set up and enforced after a long silence and acquiescence.² Their provisions as to the length of time given for different kinds of actions differ in the different States and cannot be set out here. A summary of their main provisions and exceptions will however be found useful.

§ 488. **When Statute Begin to Run.** — In the ordinary course, the statutes begin to run or to take effect as soon as the cause of action arises, *i. e.*, from the time when the injured party becomes first entitled to bring his suit,³ but

St. 537; Hubbell v. Shoening, 58 Barb. 498; Bracken v. Martin, 3 Yerg. 55; Nelson v. Bank, 27 Md. 51; Baird v. Baird, 5 J. Marsh. 580.

¹ Holgate v. Eaton, 116 U. S. 38; Callen v. Ferguson, 29 Pa. St. 247; Madox v. McQueen, 3 A. K. Marsh. 400; Miller v. Henlan, 51 Pa. St. 265; Childress v. Holland, 3 Hayw. (Tenn.) 274; Alexander v.

Hoffman, 70 Ill. 114; Hedenberg v. Jones, 73 Ill. 149; Fitch v. Willard, 73 Ill. 92.

² Jewett v. Pettit, 4 Mich. 509; Parker v. Butterworth, 46 N. J. L. 247; 50 Am. Rep. 407.

³ McMichael v. Carlyle, 53 Wis. 504; Jones v. Jones, 91 Ind. 378; Zuck v. Culp, 59 Cal. 142.

the statutes generally provide that infancy, coverture, insanity, imprisonment, or absence beyond seas shall, where the plaintiff is affected by any of these disabilities at the time the cause of action arose, suspend the operation of the statute until the removal of the disability. But a disability arising after the period of limitation has begun to run will not affect the operation of the statute unless the statute so declares.¹

The statute will not be prevented from running because of the ignorance of the plaintiff that a right of action existed.² But in equity where that ignorance is produced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the *discovery of the fraud*.³ And the equitable rule has been adopted in some of the States by the express terms of the statutes, which run only from the time that a fraudulent concealed right becomes known to the person suing.⁴

§ 489. **Statutory Bar May be Removed.** — The statutes of limitations do not extinguish the right but merely bar the remedy, and they therefore provide that the claim may be

¹ Jackson v. Jackson, 5 Cow. 74; 15 Am. Dec. 433; Hogg v. Ashman, 83 Pa. St. 80; Underhill v. Mobile Fire Dept., 67 Ala. 45; Hunton v. Nichols, 55 Tex. 217; Bozeman v. Browning, 31 Ark. 384; Hogan v. Kurtz, 94 U. S. 773; Swearingen v. Robertson, 39 Wis. 462; Kistler v. Heath, 75 Ind. 177; 39 Am. Rep. 131.

² Crawford v. Gaudin, 33 Ga. 173; Sinclair v. South Carolina Bk., 2 Strob. 244; Cole v. McGlathey, 9 Greenl. 131; Leonard v. Pitney, 5 Wend. 30; Foster v. Eison, 17 Gratt. 331; Campbell v. Long, 20 Iowa, 382; Martin v. Decatur Bank, 31 Ala. 115; Hartford Bank v. Watermann, 26 Conn. 324; Bassard v. White, 9 Rich. (Eq.) 433; Davis v. Cotten, 2 Jones (Eq.), 430; Reading v. Reading, 1 Halst. 186; Williams v. Pomeroy Coal Co., 37 Ohio St. 533; Peak v. Buck, 3 Baxt. 71.

³ Haymore v. Yarkin Comms., 85 N.

O. 263; Campbell v. Long, 20 Ia. 382; Stevenson v. Robinson, 39 Mich. 160; Atlantic Bank v. Harris, 118 Mass. 147; Commissioners v. Smith, 29 Minn. 97; Biggs v. Lexington R. Co., 79 Ky. 470; Duffitt v. Tuhan, 28 Kan. 293; Ossipee v. Grant, 59 N. H. 70; Somerset Freeholders v. Veghte, 44 N. J. L. 519; Clews v. Traer, 57 Iowa, 459; Reed v. Minell, 30 Ala. 61; Pendergrast v. Foley, 8 Ga. 1; Walker v. Walker, 25 Ga. 76; Frankfort Bank v. Markley, 1 Dana, 363; Underhill v. Mobile Fire Dept. Ins. Co., 67 Ala. 45; Connolly v. Hammond, 58 Tex. 11; Frey v. Aultman, 30 Kan. 181; Torrence v. Alexander, 35 N. C. 143; Conner v. Goodman, 104 Ill. 385; Ynlestra v. Tarleton, 67 Ala. 126; Harrell v. Kelly, 2 McCord, 426; Wilcox v. Jackson, 57 Iowa, 273.

⁴ See cases cited in last note.

revived after it has become barred by the lapse of the statutory period by (a) a new promise to pay the debt; by (b) a subsequent acknowledgment of the debt; or by (c) a part payment of the debt.

(a) A debtor may by a new promise to 'pay the debt remove the bar of the statute, and become liable to be sued upon it. Such a promise, as we have seen, is valid though made upon a past consideration.¹

(b) The early cases held that a simple allusion to the debt as existing, though accompanied by a declaration of an intent not to pay, was a sufficient "acknowledgment" to remove the bar of the statute. But it is now universally held that the "acknowledgment" to be effective must be in such terms as warrant the inference of a promise to pay the debt.² And both the promise and the acknowledgment to remove the bar must be made to the proper person, by the proper person, and with proper formalities when they are required by statute, — which are in most of the States that they shall be in writing.³

(c) A part payment, or payment on account of the principal, or a payment of interest upon the debt, will take the contract out of the statute of limitations. But the payment must be made with reference to the original debt, and in such a manner as to amount to an acknowledgment of it.⁴

¹ See *ante*, § 108.

² *Purdy v. Austin*, 3 Wend. 187; *Riggs v. Roberts*, 85 N. C. 151; 39 Am. Rep. 692; *Abercombie v. Butts*, 72 Ga. 74; 53 Am. Rep. 832; *Perry v. Chesley*, 77 Me. 393; *Holt v. Gage*, 60 N. H. 536; *Krebs v. Olmstead*, 137 Mass. 504; *Biddell v. Brizolara*, 64 Cal. 334; *Parker v. Shuford*, 76 N. C. 219; *Hussey v. Kirkman*, 95 N. C. 63.

³ *Kirby v. Mills*, 78 N. C. 124; 24 Am. Rep. 460; *Tessin v. Camblin*, 1 Bradw. 424; *Fuqua v. Dunwiddle*, 6 Lea, 645.

⁴ *Tippets v. Heano*, 1 C. M. & R. 252;

Cucullu v. Hernandez, 103 U. S. 105; *Engman v. Immel*, 59 Wis. 249; *Benton v. Holland*, 58 Vt. 533; *State v. Corliss*, 47 N. J. (L.) 103; *Miner v. Lorman*, 56 Mich. 213; *Alms House Farm v. Smith*, 59 Conn. 434; *Whitney v. Chambers*, 17 Neb. 90; 52 Am. Rep. 398; *Kaufman v. Broughton*, 31 Ohio St. 424; *Buxton v. Edwards*, 134 Mass. 567; *Cocker v. Cocker*, 2 Mo. (App.) 451; *Davis v. Coleman*, 7 Ired. 424; *Barron v. Kennedy*, 17 Cal. 574; *Mo-Gehee v. Greer*, 7 Port. 534; *Littlefield v. Littlefield*, 91 N. Y. 363.

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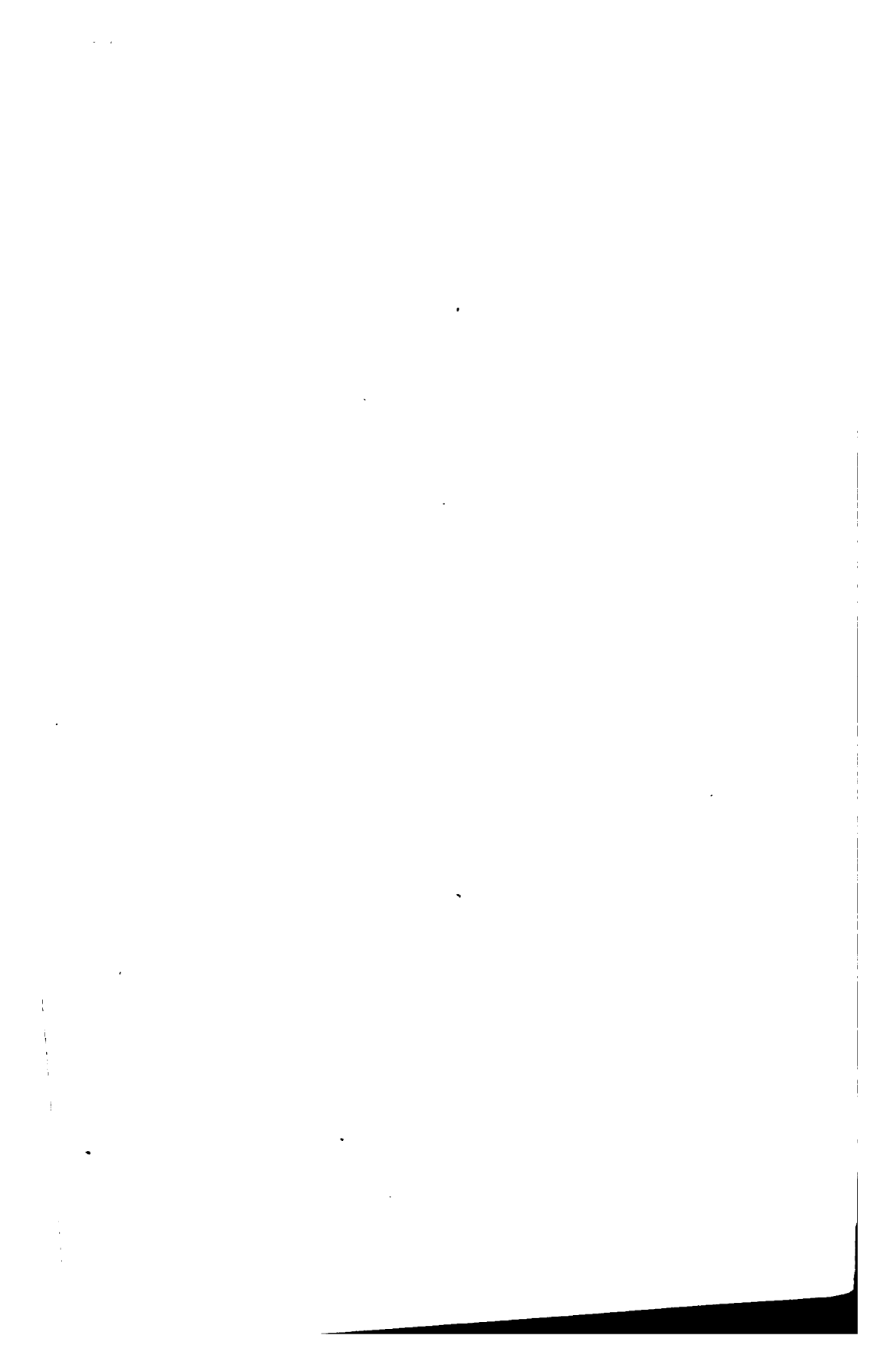
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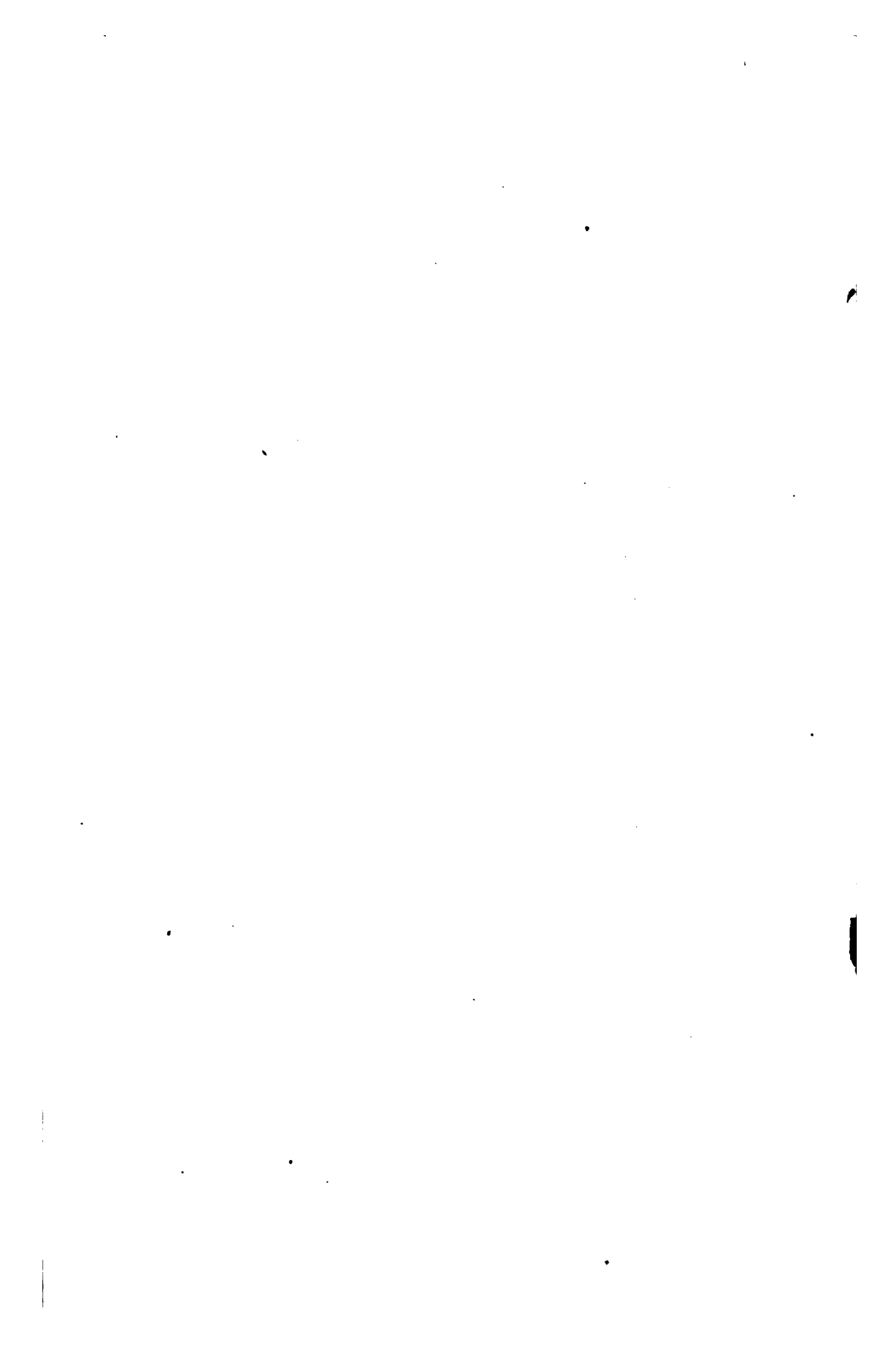
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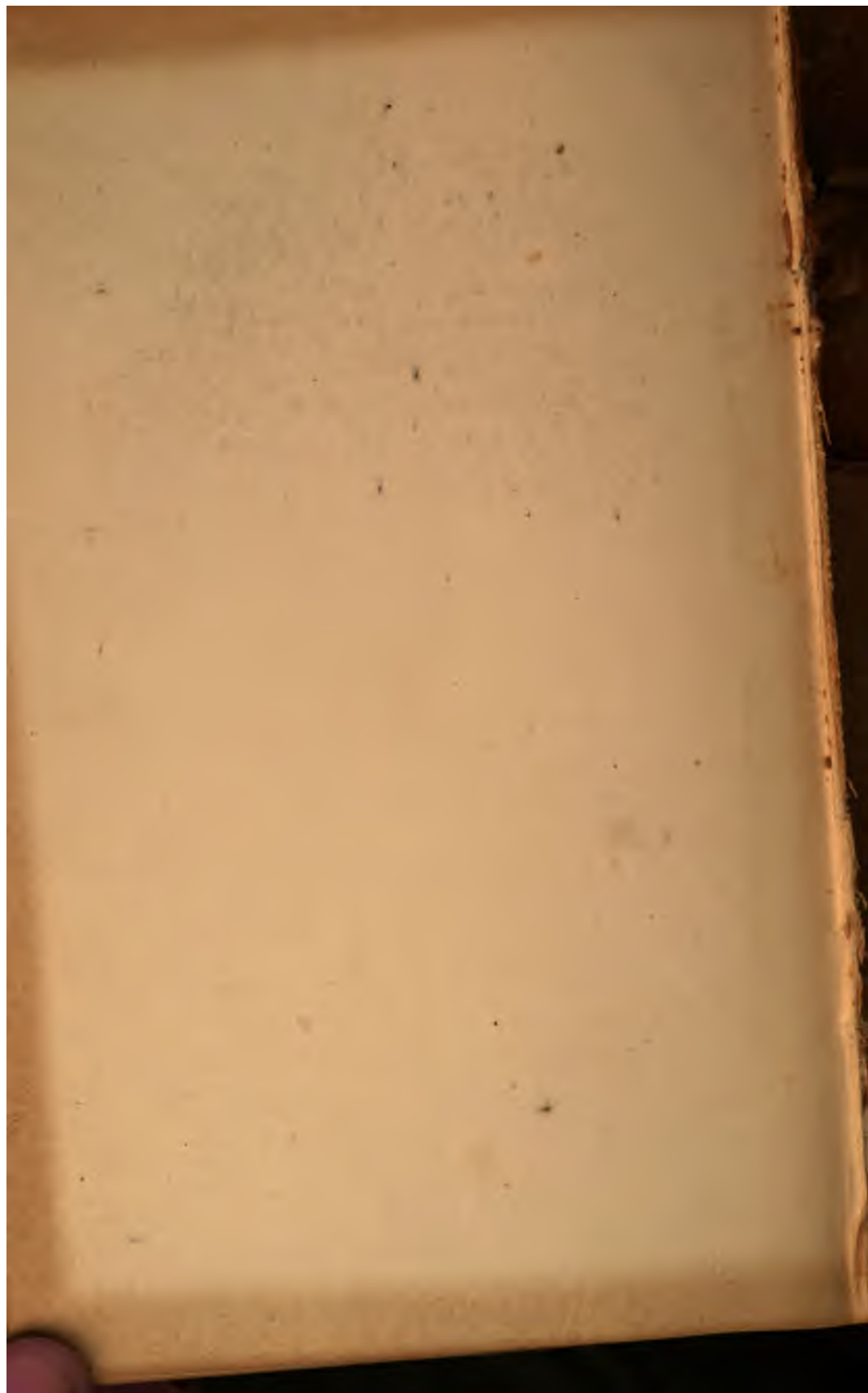
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